BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL 346

and

DOUGLAS COUNTY (HIGHWAY DEPARTMENT)

Case 254
No. 62467
MA-12301

(Mechanics Scheduling Grievance)

Appearances:

Brown, Andrew & Signorelli, P.A., Attorneys at Law, by **Timothy W. Andrew**, on behalf of Teamsters Local 346.

Frederic P. Felker, Douglas County Corporation Counsel, on behalf of Douglas County.

ARBITRATION AWARD

Teamsters Local 346, hereinafter the Union, requested that the Wisconsin Employment Relations Commission provide a panel of staff arbitrators from which the parties select an arbitrator to hear and decide the instant dispute between the Union and Douglas County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 17, 2003 in Superior, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 20, 2003. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues, but were unable to stipulate to a statement of the substantive issues and agreed the Arbitrator will frame the issues.

The Union would state the issues as follows:

> Whether the County's elimination of the Tuesday through Friday mechanic work shift (when the mechanics vote for 4-10 hour days per week in the summer) violates Article XXIV, Section 6.b. of the parties Collective Bargaining Agreement?

The County would state the issues as being:

> Did the Douglas County Highway Department violate the Collective Bargaining Agreement when it scheduled all mechanics to work Mondays through Thursdays during the four-day work week schedule that ran from May through September, 2003? If so, what is the appropriate remedy?

The parties' statements are effectively the same, however, as the County's statement also addresses remedy, it is deemed to more fully set forth the issues to be decided.

CONTRACT PROVISIONS

The following provisions are cited in relevant part:

ARTICLE 4.

MANAGEMENT RIGHTS:

The County possess the sole right to operate the County Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

A) To direct all operations of the County;
B) To hire, promote, schedule and assign employees to positions with the County.
C) To suspend, demote, discharge and take other disciplinary action against employees for just cause.
D) To relieve employees from their duties, to change assignments or lay-off.

E) To take whatever action is necessary to comply with State or Federal law.
F) To introduce new or improved methods or facilities.
G) To determine the methods, means and personnel by which County operations are to be conducted.
H) To take whatever action is reasonably necessary to carry out the functions of the County in situations and emergency.
I) To establish work rules and schedules of work.
J) To maintain efficiency of County operations.

. . .

ARTICLE 24.

. . .

Section 6. Each calendar year the employees shall vote by union ballot to approve a four-day work week. The vote shall be counted and the results given to the Department by March 15th of the same year.

If the four-day work week is approved by vote by the union members, the following terms and conditions shall apply identifying changes in the operations of the Highway Department during those times when the employees' work schedule is comprised of a four-day work week consisting of ten (10) hours each day in the case of all positions except the clerical support staff whose hours will equal 37½ per week.

a. The period for the four-day work week shall commence at the beginning of the second full pay period in May through the first full pay period in September. The exact dates will be established each year prior to the vote.

The normal 10-hour work week will be designated as Monday – Friday from 6:00 am to 4:30 pm excluding holidays. Exceptions to this work week include the mechanics, BSW, one working foreman, and the office staff.

b. The work week for operators and working foremen shall be identified as Monday through Thursday. However, one working foreman may opt to work a 10-hour shift Tuesday-Friday with Monday off. If more than one working foreman opts for this shift it will be granted to the most senior working foreman.

> In order for the County to have sufficient mechanical coverage on Fridays, a maximum of two mechanics may volunteer (in order of seniority) for a Tuesday through Friday work week. If two mechanics do not volunteer for the Tuesday through Friday work week, the most junior mechanic may be assigned. The most senior mechanic working on Fridays shall receive foreman's pay. The Department office will be staffed Monday through Friday, 6:00 a.m. to 4:00 p.m., excluding holidays. The BSW shall continue to work the regular 40-hour, five-day a week schedule.
>
> . . .
>
> f. The following classifications can exercise shift choices or flex time when available: BSW, office staff, mechanics and shop foreman. This means they can work either the four-day or five-day week, which ever they choose, however, once chosen they must work the chosen shift for the duration of the four-day week, i.e.. May to September.

BACKGROUND

The County maintains and operates the Douglas County Highway Department and the Union is the collective bargaining representative of the Department's employees. From 1992 until March of 1998, George Palo was the Highway Commissioner. Paul Halverson has been the Highway Commissioner since August of 1998. Colin Hayes has been the Union's business agent representing the Department's employees for the past eight years.

In negotiations for the parties' 1996-1997 agreement, the County proposed a four-day work week for the warm months. Palo testified it was his idea, but that he approached the County's chief negotiator at the time with the idea of having mechanics work Tuesday through Friday to meet concerns of the Shop Foreman and the Patrol Superintendent about having the equipment ready on Monday. According to Palo, he wanted language in the agreement that would give management the flexibility to staff when it needed it. Palo was not directly involved in the negotiations, and left his position with the County before actual negotiations started.

The Union's Business Agent, Colin Hayes, testified he was involved in negotiating the language that was originally agreed to by the parties in the 1996 agreement. Hayes testified that Palo had contacted him about discussing working a four ten-hour days work week, and that Hayes and the local stewards subsequently met with the County's Human Resources person and the Patrol Superintendent to discuss how it would work. The wording in the 1996-97 agreement was the language finally agreed to. In that agreement, Article 24, 5, b, read as follows:

> b. The work week shall be identified as Monday through Thursday. In order for the County to have coverage Friday on state roads three employees shall rotate and work Tuesday through Friday. These employees shall volunteer in order of seniority and if no employee volunteers, the most junior work-related employees shall be assigned. The most senior person working on Fridays, shall receive working foreman pay if a working foreman is not present. The Department will be staffed Monday through Friday 6:00 a.m. to 4:30 p.m., excluding holidays.

Article 24, 5, g, in the 1996 agreement was identical to the wording of Article 24, 6, f, in the parties' present agreement. Hayes testified that while Section 5, b, did not mention mechanics, that when they voted on whether to work four ten-hour days, if they did, they also then had to decide whether to work Monday through Thursday or Tuesday through Friday.

In negotiations for the parties' 1998-1999 agreement, the parties agreed to include wording specifically addressing the mechanics in Article 24, 5, b:

> b. The work week for operators and working supervisors shall be identified as Monday through Thursday. In order for the County to have sufficient mechanical coverage on Fridays, a minimum of two mechanics may volunteer (in order of seniority) for a Tuesday through Friday work week. If two mechanics do not volunteer for the Tuesday through Friday work week, the most junior mechanic may be assigned. The most senior mechanic working on Fridays shall receive foreman's pay. The Department will be staffed Monday through Friday, 6:00 a.m. to 4:30 p.m., excluding holidays. The maintenance crew shall continue to work the regular 40-hour, five-day a week schedule. The clerical group will work a flex schedule which meets the Department's staffing needs, and is mutually agreed to.
>
> The parties may agree that any Friday field maintenance will follow the call out procedure.

In the negotiations for the parties' 2000-01 agreement, the wording of subsection b (now Sec. 6, b) was changed to the current wording. The change with regards to the mechanics was to change ". . .a minimum of two mechanics may volunteer. . ." to "a maximum of two mechanics may volunteer. . ."

Hayes testified that during this time he continued to schedule the votes among the different classifications whether to work a four-ten hour days work week, and for the mechanics, if so, whether to work Monday through Thursday, or Tuesday through Friday. Hayes then would notify Halverson of the results.

After being notified by Hayes of the results of the votes, including that the mechanics voted in favor of four-tens and that Rick Smith and Kevin Little would work Tuesday through Friday, on April 3, 2002, Halverson issued a memorandum to all Highway Department employees, which stated in relevant part, "In addition, the mechanical staff will work Monday through Thursday, with no regularly scheduled mechanical coverage on Fridays."

The Union disputed Halverson's memo and there was a meeting between Hayes, the affected mechanics and Halverson to discuss Halverson's decision. Hayes cited Article 24, 6, b, in support of the Union's position that management cannot unilaterally discontinue the Tuesday through Friday shift, if mechanics have volunteered to work it. Halverson eventually changed his decision, and the two mechanics who volunteered to work the Tuesday through Friday shift did so. Halverson testified that in agreeing to back off from his decision he told the Union that the matter would be evaluated.

In the Fall of 2002, in the course of the parties' negotiations for a successor agreement, the County proposed, among other changes, to delete the first three sentences of the second paragraph of Article 24, 6, b. Halverson testified this was his proposal, as it was his intent to have mechanics work Monday through Thursday, and he felt the wording was unnecessary and that its deletion would eliminate the need to discuss it with the Union. According to Halverson, the County agreed to drop the proposal because it obtained the new management rights clause giving management the right to schedule.

The County's chief negotiator, Mary Lou Andresen, testified that while the County withdrew its proposal eventually, it did so on the basis that it felt it had the right to decide not to have a Tuesday through Friday shift under other existing contract language and that the existing wording of Article 24, 6, b, provided an orderly process if the County decided a Tuesday through Friday shift was available, and because the parties had agreed to a new management rights provision. Andresen further testified that, in withdrawing its proposal to delete the wording, the County advised the Union's bargaining team that it believed management had the right under the existing language to decide whether or not to have a Tuesday through Friday shift, and that for 2003 all mechanics would be scheduled Monday through Thursday. This was memorialized in writing in the County's package proposals of December 17, 2002 and January 14, 2003. According to Andresen, the Union's response was that they "agree to disagree". The testimony of Hayes and Union steward Rick Smith is consistent with Andresen's in this regard. Smith and Beck testified that at the Union's ratification meeting, it was explained that the County had withdrawn its proposal, but said it would have mechanics work Monday through Thursday.

In March of 2003, Hayes again sent out his letter to the bargaining unit laying out the procedure for the votes on the four-ten hour days. By letter of April 8, 2003, Hayes informed Halverson of the results of the votes and that the Grievants, Beck and Carlson, had elected to

work Tuesday through Friday. In May of 2003, the Grievants were called into a meeting with Halverson, the Patrol Superintendent and the Shop Superintendent. Halverson read off a list of reasons of why management was scheduling all of the Mechanics to work Monday through Thursday and then told them to report for work on Monday. Both Beck and Carlson grieved Halverson's decision.

The grievances were processed through the parties' contractual grievance procedure. Being unable to resolve their dispute, the parties proceeded to arbitration of the grievances before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that the language of Article 24, 6, b, paragraph 2, is clear and unambiguous. The phrase "in order for the County to have sufficient mechanical coverage on Fridays. . ." requires Friday coverage, and prefaces the explanation of how sufficient mechanical coverage on Friday is to be provided in the next clause and the following sentence. Contrary to the County's assertion, the word "sufficient" does not call for managerial determination of what is sufficient coverage, rather, "sufficient mechanical coverage" is what the parties agreed to and the remainder of the disputed language explains how that is to be provided.

Under the County's erroneous interpretation, if the County deems no coverage on Fridays to be sufficient, the remainder of the provision explaining how coverage on Fridays is provided becomes meaningless. An interpretation which renders meaningless any part of the contract should be avoided, as the parties do not carefully write into an agreement words intended to have no effect. As the Union's interpretation gives effect to all the words and clauses, it must therefore be followed.

The Union asserts that if the parties intend to vest discretion with the employer, they know full well how to write provisions that preserve the County's right to disapprove of scheduling changes to meet the needs of the Department, e.g., Article 23, Article 24, Section 5, and Article 24, Section (g). However, no such language is found in Section 6, b, which language unambiguously requires Friday staffing.

Next, the Union asserts that it is the intent of the parties when the language was first negotiated that governs, and not a meaning that can possibly be read into the language. Citing Elkouri and Elkouri, *How Arbitration Works*, Fifth Edition, page 480. Colin Hayes was the only person who was at the bargaining table in 1996 and 1998 who testified. Hayes testified that the language at issue came about because the County wanted mechanical coverage on

Fridays and the question then became how to staff the garage on Fridays, keeping in mind preference for senior employees. As a result, the parties agreed to the language at issue. Hayes testified without contradiction that when the language was first adopted in 1998, the County did not claim any reserved right to determine whether to continue Friday mechanical coverage. While the County attempted to offer the testimony of former Highway Commissioner George Palo, he left the County in March of 1998 almost a year before the contract which first included the language in question was signed, and Palo conceded he took no part in the bargaining of that language.

Further, based on the intent of the parties, a past practice has developed. Hayes testified that based on the negotiation of the language in issue, for years he annually polled the mechanics on the question of not only whether they desired to work four-ten hour days, but their preference in working a Monday-Thursday shift or a Tuesday-Friday shift. Hayes' annual letter informed the Highway Commissioner of the mechanics who selected the Tuesday-Friday shift. The practice has never included a determination by the County as to whether to staff the garage on Friday, nor an inquiry by the Union of any such staffing change. It is clearly an established practice which proves the parties intended the disputed language to require Friday mechanical staffing.

The Union also cites a prior grievance settlement in support of its view that the disputed language requires Friday mechanical coverage, and cites Elkouri and Elkouri for the principle that a previously-arrived at grievance settlement necessarily includes some form of contract interpretation, and that therefore the parties' settlement interpretation will be given significant weight in construing the same contract language. In April of 2002, Highway Commissioner Halverson ordered all mechanical staff to work Monday through Thursday, despite the fact that Hayes had written to him in March informing him that mechanics Carlson and Little had elected to work Tuesday through Friday. A grievance was filed citing Article 24, Section 6, b; the Union arguing that it clearly required Tuesday through Friday coverage. Hayes testified that at the April 15, 2002 grievance meeting, the County made the same argument that it makes now, i.e., that it can determine what is sufficient mechanical coverage and decide that no coverage on Friday is sufficient. He testified without contradiction that the grievance was resolved by the County's withdrawal of its position and its agreement to honor the Tuesday-Friday shift for the senior mechanics. Had the County believed in 2002 that its position had merit, it would have pursued its position to arbitration. The prior settlement of the identical issue must be given significant weight by the Arbitrator.

Although not a grievance situation, the County's attempts to deal individually with the Grievants in this case is another example that the County did not believe that it had the right to eliminate Tuesday-Friday mechanics shift. In April of 2003, after being informed that the Grievants had selected the Tuesday-Friday shift, Halverson and Patrol Superintendent Westor scheduled a meeting with them, without Union stewards, to convince them to voluntarily

accept a Monday-Thursday shift, going so far as to have a pre-typed list of reasons why the Grievants should capitulate to the County's position. Presumably the County would not have sought the Grievants' consent if it believed it had the right to unilaterally eliminate the Tuesday-Friday shift. The County knew that it could not, and therefore sought a waiver of the Grievants' right to select the shift.

The Union also cites the County's attempts in bargaining to delete the disputed language as further proving that the parties understood the language to require Tuesday through Friday mechanic shifts. The present case is the classic case of a negotiating party attempting to obtain through arbitration what it could not through negotiations. It is undisputed that the County sought in the last round of negotiations to delete the second paragraph of Section 6. b., the same language the Union relied on when it grieved less than a year earlier. Hayes and Rick Smith both testified that when County chief negotiator Mary Lou Andresen explained the County's proposal, she stated that the deletion of the disputed language was sought in order to allow the County to schedule mechanics only Monday-Thursday. Smith testified that as a result, he asked the mechanics whether they were willing to give up their Tuesday-Friday shift. Thus, it is difficult to imagine better evidence that the parties understood the disputed language at issue as requiring mechanical coverage on Friday. It is undisputed that throughout negotiations, the Union rejected the proposed deletion of the language and the County eventually withdrew the proposal. At the time the language was withdrawn, the County told the Union that for 2003 all mechanics would be scheduled Monday-Thursday. However, such a unilateral statement by a party, at the time they withdraw a proposal, means nothing and does not evidence any meeting of the minds or provide any other evidence to aid in the interpretation of the agreement. A party is always free to withdraw a proposal and make a statement during negotiations; it is only when the other party acts in response to those statements that any significance can be attached. Here, the Union could only simply wait until the threatened action was done and grieve it as they had done.

The Union also asserts that the arguments the County made in denying the grievance are without merit. The parties' agreement to modify the management rights clause during the last round of bargaining, has no bearing on this dispute. The County's argument that the agreement to modify the general management rights clause takes precedence over the specific language of Section 6, b, has no merit. The adoption of the new management rights clause which included specific examples of reserved management rights, did not significantly change the County's management rights. Listing specific examples, including the right to schedule work, means nothing. Under both the former management rights clause and the new management rights clause, management has the right to schedule work, except as specifically provided for in the remainder of the labor contract. Article 24, Section 6, b, is such a specific provision governing mechanic scheduling in the summertime when the Union elects to work a four-ten hour per day basis. Based on the rule that a specific provision prevails over more general provisions, the Arbitrator should find that the new management rights clause has no

bearing on this dispute, since management bargained away its right to schedule mechanics for exclusively Monday-Thursday shifts.

The County also incorrectly argues that the use of the word "may" in 6, b, confers upon it the discretion to eliminate Tuesday-Friday shifts. The language is an example of the seniority concept known commonly as "senior may, junior must" and is very typical of language granting senior employees the right to select a shift and allowing the employer the right to force junior employees to work the remaining shifts. The language clearly provides that the senior mechanics "may volunteer" and if they do not, junior mechanics "may be assigned" by the County. Nothing in the language suggests the County has the discretion to eliminate a Tuesday-Friday work week. The County contrasts the current language of 6, b, with the language of Article 24, Section 5, b, in the parties' 1996 agreement, arguing that the use of the word "shall" in the old contract means something. As was explained at hearing, the language in the 1996 agreement was to ensure operator coverage of state highways on Fridays. Even under the old language, the concept was the same, senior employees could volunteer for the Tuesday-Friday shift and, if no one volunteers, the most junior employee shall be assigned. It makes no difference whether "mechanics may volunteer" or drivers "shall volunteer". In either case, no discretion is conferred on the County to eliminate the right of the senior employees to select a Tuesday-Friday workweek.

The Union also asserts that the County's purported operational and safety reasons for eliminating the mechanic Tuesday-Friday shift must be disregarded. The County argues that the language of Section 6, b, was negotiated when its mechanics worked out of Superior, located in the northwest corner of the County, as opposed to the currently centrally-located Hawthorne garage. The County argued that when the garage was based in Superior, it used Friday mechanic coverage for maintenance on vehicles, now it argues it desires to have mechanics working only on the same day operators are working. The County also cites safety concerns with mechanics working alone on Fridays. Regardless of whether the County's operational or safety concerns are valid, the County's witnesses all agreed that the County had all of those concerns in mind as a reason for proposing the deletion of Section 6, b, during negotiations. Even if the County's justifications are believed, that simply means that the County should have bargained more skillfully to convince the Union to agree to its proposal to delete the language. The justifications for the County's desire to delete the language at issue was relevant when the County was negotiating the contract, however, those same justifications at this point have no bearing on the meaning of the language. The Union also does not concede that the County's justifications or safety concerns are meritorious. Regarding the latter, the Shop Superintendent testified he was not prepared to adopt a general rule prohibiting mechanics from working alone and further agreed that mechanics are often called in to work alone or sent to the field to work alone.

The Union requests that the grievance be sustained and the County ordered to make the most senior Grievant whole for his denial of foreman's pay at the rate of $0.29 per hour for all hours worked on Fridays during the summer of 2003.

County

The County first asserts that the context and history of the language in question supports its position that it may decline the mechanics' offer to work Tuesday-Friday. While the wording of Article 24, Sections 6, b, and 6, g, 1/ without regard to their context and the bargaining history, might at first blush seem to give mechanics the absolute right to work Tuesday-Friday, such an interpretation glosses over other relevant contract language. Section 6, g, states that shift choices or flex time may be exercised "when available." Hayes conceded that he did not believe that it was the Union's choice to determine when shift choices or flex time are in fact "available". The prefatory language in 6, b, "in order for the County to have sufficient mechanical coverage on Fridays. . ." would be surplusage under the Union's interpretation. If there are two possible interpretations of a clause, the one that would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination is to use the interpretation that gives effect to all provisions. Elkouri and Elkouri, Fifth Edition, at page 493. Here, the contract language can only be given effect if the County has the ability to determine what is "sufficient" mechanical coverage. If the County is not able to do this, the language is rendered meaningless.

1/ It appears from the language quoted by the County that it is referring to Section 6, f, rather than 6, g.

Further, in the previous paragraph of 6, b, a working foreman may "opt" to work a ten-hour shift, Tuesday-Friday with Monday off. The dictionary definition of "opt" is "to make a choice" or "to decide in favor of something." Thus, used in its context, "opt" clearly gives a choice to a working foreman to work a ten-hour shift, Tuesday-Friday. This language was negotiated into the 2002 agreement and clearly means something other than to "volunteer". The County also cites the original contract language when the four-day workweek was first implemented in the parties' 1996 agreement. That wording stated, "In order for the County to have coverage Friday on state roads, three employee (sic) shall rotate and work Tuesday through Friday. These employee (sic) shall volunteer in order of seniority, and if no employee volunteers, the most junior work-related employee shall be assigned. The most senior person working on Fridays, shall receive working foreman pay if a working foreman is not present." Mechanics were among those who could exercise shift choices or flex time "when available" under the original language. No evidence was introduced that any mechanics worked other than Monday-Thursday during the duration of that agreement. The

use of the word "shall" in the 1996 agreement is significant when considering that the language in the next agreement utilizes the words "volunteer" and "may" with respect to the Tuesday-Friday workweek. Clearly, the original language was intended to have three employees work state highways without regard to management prerogative. Construing the wording of the current agreement as a whole, it can be concluded that it is for management to determine when shift choices are available, and what is sufficient mechanical coverage on Fridays, and that management is not obligated under the current language to accept two mechanic volunteers to work Tuesday-Friday.

While evidence of the original intent of the parties in adopting the language in Article 24, 6, b, is admittedly scant, Shop Superintendent Grymala testified that it had never been his intent or understanding the provision would be as inflexible as the Union's current interpretation. Former Highway Commissioner Palo testified that it was also not his intent when he requested such language be added to the contract that it be so inflexible as to tie management's hands. Patrol Superintendent Westor testified that he never understood the language to mean that management could not return mechanics to working Monday-Thursday shifts. Scant as the County's evidence is of its intent in negotiating the disputed language, the Union's testimony was largely confined to how it interpreted the language after it was actually put into practice, and offered virtually no evidence concerning the intent of its negotiators in agreeing to the language.

While the language as it exists may be interpreted consistent with management retaining its rights to schedule mechanics to work Monday-Thursdays, at worst the language is merely silent in that regard. To the extent the Union argues past practice or recent bargaining history as a means of filling in the gap, there is no past practice or bargaining history which could accomplish this. While the Union offered testimony that every year since the four-day workweek had been adopted, the Union voted to work the four-day workweek and every year two mechanics volunteered to work Tuesday-Friday, this does not demonstrate anything more than that the parties did what they were allowed to do under the agreement. The only exception occurred in the Spring of 2002 when the Highway Commissioner indicated his intent to have all mechanics work Monday-Thursdays, resulting in a protest from the Union and a meeting between the parties at which it was agreed to allow the Tuesday-Friday shift, with the comment that its effectiveness would be further evaluated. The dispute was not resolved with a side letter or memorialized in writing in any way. This one instance of management altering its course does not establish any kind of practice sufficient to construe a contractual gap or ambiguity.

The County also asserts that the evidence that it proposed to delete that language in bargaining and that it ultimately withdrew that proposal when the Union refused to accept it, at most shows that the parties agreed to disagree. While the striking of the language in question would have allowed management to do what it has done, retention of the language also allows

management the alternative of refusing or accepting the two volunteers for the Tuesday-Friday shift if it views that as advantageous.

To the extent the Union argues that their position has been established through past practice, even where a practice has been found to exist, it may be modified or eliminated when the underlying basis for it has changed. In this case, the underlying basis for the mechanics working Tuesday-Friday has been largely eliminated by changing the location of the Highway Department from Superior to the Town of Hawthorne. Further, even if a practice were said to exist, it was purged in the negotiation process. A practice that is not subject to unilateral termination during the term of an agreement is subject to termination at the expiration of the agreement by giving due notice of intent not to carry the practice over to the next agreement and the other party having been so notified must have the practice written into the agreement to prevent its elimination. Citing, Elkouri and Elkouri, at page 643. It is uncontroverted that the Union was placed on notice on multiple occasions during bargaining that the Tuesday-Friday shift would be eliminated for 2003. They were specifically notified of this and management's construction of the language, both at the time it withdrew its proposal to eliminate the language, as well as when the new management rights language was agreed to. Finally, arbitrators have distinguished between practices which are of personal value to employees, as opposed to traditional functions of management. "Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. . ." Elkouri and Elkouri, at page 635. The personal benefit in this case might be said to be the nominal value of performance pay to the senior worker, which would seem to be far outweighed by management's traditional prerogative to schedule work.

The County also asserts that it is within the Highway Commissioner's management rights to schedule mechanics to work Monday-Thursday during the summer four-day workweek schedule. "Many arbitrators have recognized that except as restricted by the agreement, the right to schedule work remains in management" and that limitations on that right "ought not be lightly inferred." Elkouri and Elkouri, pages 725-727. While the agreement permits two mechanics to volunteer to work a Tuesday-Friday shift with the concurrence of management, it neither expressly permits nor forbids management from declining the voluntary shift changes. It ought not be lightly inferred that management forfeited its scheduling rights by agreeing to the language in question. Section 6, f, infers to the contrary that mechanics and other named staff may exercise "shift choices or flex time" only when "available". Further, the Union agreed to a new, more expansive management rights provision in the last negotiations. In contrast to the general reserved rights in the old provision, the new management rights language specifically gives management the right to "direct all operations of the County", "schedule and assign employees to positions within the County", "introduce new or improved methods or facilities", "determine the methods, means and personnel by which County operations are to be conducted", "establish work rules and schedules of work", and "maintain efficiency of County operations." During the negotiations,

the Union was specifically informed by the County's negotiators that it was their interpretation of the new management rights language that it allowed management to direct all mechanics to work Monday-Thursdays. While the Union may not have affirmatively accepted the County's position, they certainly acquiesced in it by agreeing to the language.

The County requests that the grievance be denied.

DISCUSSION

Looking to the wording of paragraph 2 of Article 24, 6, b, the undersigned disagrees that the provision on its face requires there be mechanics staffing on Friday during the four-day work week season. The provision states that a maximum of two mechanics may volunteer to work Fridays and that management may assign the most junior mechanic, if two mechanics do not volunteer. Use of the word "may", as opposed to "shall", means it is permitted, but not required. 2/ Thus, there could be two (if two volunteer), one (if no one volunteers and the junior mechanic is assigned) or no (if management chooses not to assign) mechanics working a Tuesday through Friday work week under that wording.

2/ As the County notes, the wording of Article 24, 5, b, in the parties' 1996 agreement stated "In order for the County to have coverage Friday. . .three employees shall rotate. . ."

The question, however, is whether management is required to permit two mechanics to work the Tuesday through Friday work week, if the mechanics do volunteer. For the following reasons, it is concluded that management is not required to do so.

First, while paragraph 2 states its purpose is "to have sufficient mechanical coverage on Fridays. . .", it does not define what constitutes "sufficient mechanical coverage." As noted above, under the wording of the provision, there could be as many as two or as few as no mechanics working on Fridays. In the absence of a contractual limitation, management retains the right to determine how many employees it needs on a shift, i.e., what coverage is "sufficient". Under the Union's interpretation, it would be the mechanics who could determine whether there would be two mechanics working on Fridays by dint of their volunteering to do so, regardless of whether management felt coverage was needed. Unlike the present wording of 6, b, the wording in the parties' 1996-97 agreement, Article 24, 5, b, provided that "In order. . .to have coverage on Friday on state roads three employees shall rotate and work Tuesday through Friday. These employees shall volunteer in order of seniority and if no employee volunteers, the least junior work-related employee shall be assigned." Like the County, the undersigned finds the use of the word "may" in the wording of the present provision, as compared to the use of the word "shall" in the earlier provision, to

be significant in this regard. In the latter provision, the wording clearly sets forth that there shall be Friday coverage on state roads. Given the use of the term "may" in the present Section 6, b, as well as a lack of definition of what is "sufficient mechanical coverage", that determination remains in the hands of management. Contrary to the Union's assertion, this interpretation does not render the wording meaningless. The wording provides the procedure for providing Friday coverage if management deems such coverage is needed. It is also noted that this is consistent with management's rights to schedule work in Article 4. 3/

3/ However, the County's reliance on 6, f, is misplaced, as that provision, on its face, applies to choosing the four-day or five-day work week, as opposed to choosing between a Monday-Thursday or a Tuesday-Friday schedule.

As to bargaining history, it does not support the Union's position as much as it claims. Hayes testified that the County did not claim the right to determine if Friday coverage was needed at all when the wording of Article 24, 6, b, paragraph 2 was agreed to at the bargaining table. However, there is no evidence in the record that the Union claimed at that time that mechanics had the right to select the Tuesday through Friday work week regardless of what management felt was needed. Rather, the evidence indicates that this issue did not arise until the Spring of 2002, when the Union first made its view known to management after Halverson had decided all mechanics would work Monday through Thursday during the four-day work week.

It was after this dispute occurred that the County proposed in the next round of negotiations to delete the wording the Union was relying upon to support its claim. While the County eventually dropped that proposal in the course of obtaining agreement on a new management rights provision, it placed the Union on notice that it believed management possessed the right to determine whether there would be a Tuesday through Friday work week for mechanics and advised the Union that it intended to schedule all of the mechanics to work Monday through Thursday during the four-day work week season in 2003. The testimony of Union witnesses Smith and Beck confirms that the County's position was made known to the Union's membership at the ratification vote, but that the Union informed the members that it would grieve if the County followed through on its stated intention of having all mechanics work Monday through Thursday. It appears that, as the County's chief negotiator, Andresen, testified, the parties "agreed to disagree" on the meaning of the provision.

Similarly, the resolution of the dispute in the spring of 2002, when Halverson had indicated his intent to have all mechanics work Monday through Thursday, is also not dispositive. In agreeing to change his mind, Halverson informed those present at the meeting that he would be evaluating whether to continue to have Friday coverage and there is no indication he acquiesced in the Union's interpretation. It is also noted in this regard that Article 24, 6, h, provides the following regarding the four-day work week provision, "In the

spirit of cooperation, the Department will address issues as they arise out of and from this agreement." Thus, it appears the parties anticipated there would be some discussion of such disputes when they arose. That provision aside, however, the fact that Halverson agreed to change his mind after discussing the matter with the affected employees and the Union's representatives, especially with his proviso that he would be evaluating the matter, is not sufficient to find that he agreed, tacitly or otherwise, with the Union's interpretation. 4/

4/ See the discussion in Elkouri and Elkouri, How Arbitration Works, Sixth Ed.:

> ***Arbitrators are reluctant, however, to view the granting of a grievance as a concurrence in the union's proffered meaning of the applicable contract provision without a clear indication that the parties had concurred as to the meaning of the language in question. The same can be said of the failure to file a grievance – it must be clear that the failure to file results from the parties' agreement on the interpretation of the contract. Where there is no mutual agreement, neither the failure to file a grievance nor the settlement of a grievance prior to arbitration can constitute a precedent.***

(At p. 459.) (Footnote omitted).

Likewise as to whether there was a binding past practice, the question of whether it was the employees' right to work the Tuesday through Friday schedule if they volunteered, or management's exercising its discretion in permitting them to do so by virtue of its decision to have Friday coverage, did not arise until the dispute in the Spring of 2002. Thus, the fact that mechanics had been permitted to work the Tuesday through Friday schedule in the past when they volunteered to do so, does not bear on the question at hand, in that it does not provide evidence of management's tacit acceptance of the Union's interpretation.

As to management's attempt in May of 2003 to convince the Grievants to voluntarily accept its decision to have them work Monday through Thursday before ordering them to do so, that would seem to be good management practice, albeit perhaps better done with their Union steward present.

Last, Halverson testified as to the reasons for his decision not to have a Tuesday through Friday shift in 2003. The record indicates those reasons have a basis in fact, and Halverson's decision was not simply arbitrary.

Based upon the foregoing, it is concluded that the County did not violate the parties' Agreement, specifically Article 24, 6, b, paragraph 2, when it scheduled all Mechanics to work Monday through Thursday during the four day work week season.

Based upon the foregoing discussion, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievances are denied.

Dated at Madison, Wisconsin, this 1st day of March, 2004.

David E. Shaw /s/
David E. Shaw, Arbitrator

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