

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

JACKSON COUNTY

and

**JACKSON COUNTY HIGHWAY EMPLOYEES LOCAL 2717-C,
AFSCME, AFL-CIO**

Case 148
No. 62559
MA-12338

(Layoff Grievance)

Appearances:

John J. Prentice, Attorney, Prentice & Phillips, 1110 North Old World Third Street, Suite 505, Milwaukee, Wisconsin 53203-1118, appeared on behalf of the County.

Dan Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appeared on behalf of the Union.

ARBITRATION AWARD

On July 22, 2003 Jackson County and Local 2717-C, American Federation of State County and Municipal Employees filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint a member of its staff to hear and decide a grievance pending between the parties. The Commission appointed William C. Houlihan to hear and decide the matter. A hearing was conducted on October 28, 2003 in Black River Falls, Wisconsin. No formal record was taken. Post-hearing briefs were submitted by January 21, 2005.

This Award addresses the right of the County to layoff/reduce the work schedule of all bargaining unit members of the Highway Department.

BACKGROUND AND FACTS

The facts are not in dispute. The County and Union have been signatories to a series of collective bargaining agreements. In negotiations leading to the 2002-03 contract, the

employer indicated to the Union that if the Union continued to push for a 3% wage adjustment there could be layoffs. The Union responded that the County should do what it had to do. The parties ultimately concluded a contract, the relevant provisions of which are set forth below.

At some point, the County determined that there was not enough money to continue to operate the Highway Department at full strength. An initial determination was made to layoff 2-3 men. The Highway Commissioner testified that such a layoff would have been in excess of 1 year. A layoff of 25 men was considered, and ultimately rejected because, according to the Highway Commissioner, it would have lasted 3 weeks, and intruded into the construction season. Finally, the County determined to reduce the work schedule of the Highway Department for three weeks in April. The County Highway Commissioner communicated that decision to the bargaining unit by the following memo:

To: All members of Highway Union Local 2717-C
From: Michael L. Hemp, P.E. Commissioner
CC:
Date: April 9, 2003
Re: Reduction of Hours of Work

Owing to budget considerations, and pursuant to Article 2 - Management Rights, Section 1, of the collective bargaining agreement between Jackson County and the Jackson County Highway Employees Union Local 2717-C, the Jackson County Highway Committee has decided there will be a reduction in the hours of work for all Local 2717-C Highway Union employees. Consequently, there will be no work April 16, April 23, and April 30, 2003.

The 36 members of the bargaining unit were not given work on the three days noted in the memo. The Union filed a grievance on the reductions in hours, contending that the County should have utilized the Layoff provision of the agreement. The grievance was denied, and the dispute has led to this proceeding.

ISSUE

The parties stipulated to the following issue:

Did the County violate the collective bargaining agreement by directing the entire workforce not to report to work on April 16, April 23, and April 30 ?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 2- Management Rights

Section 1. The County possesses the sole right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the provisions of this Contract. These rights, which are normally exercised by the Employer, include, but are not limited to, the following:

- A. To direct all operations of County government.
- B. To hire, promote, assign and retain employees in positions with the County and to suspend, demote, discipline or discharge for just cause.
- C. To relieve employees of their duties because of lack of work or for other legitimate reasons.

...

The Union and the employees agree that they will not attempt to abridge these management rights and the County agrees that it will not use these management rights to interfere with the rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the County of Jackson to consult or negotiate concerning the above areas of discretion and policies.

...

Article 6- Seniority

...

Section 5- Layoff Procedure. The County shall have the sole right to determine the position or positions to be eliminated or reduced. In reducing personnel, the last person hired in the Highway Department will be the first person laid off, providing the remaining employees are qualified to perform the remaining work.

...

Article 8-Hours of Work

Section 1. The regular workweek shall consist of five (5) consecutive eight (8)

...

POSITIONS OF THE PARTIES

The County contends that this matter is controlled by the Management Rights clause of the collective bargaining agreement. Under that provision, the employer retains broad operational rights. The County contends that this is not a layoff, and so is not regulated by the layoff provision of the agreement. The employer reads the layoff provision to apply to permanent or indefinite reductions of personnel or hours. The County cites arbitral authority for the premise that a reduction in hours is not a layoff.

The employer addresses Article 8, Hours of Work, and contends that there exists no guarantee of work in that provision.

It is the Union's position that the seniority and layoff provisions are negotiated to secure the employment and earnings of senior bargaining unit members. The County has violated that principle. Whatever rights are conferred upon the employer by the Management Rights section are tempered by the commitment not to use those rights to interfere with the rights established under this agreement.

The Union points to the exchange at the bargaining table. There, the County talked about the potential for layoffs. The Union responded in kind. The Union asserts that both were talking in the context of the contractual definition of layoffs.

DISCUSSION

The parties disagree over whether this reduction in the work week should be addressed as an assignment of work case or as a layoff. However characterized, I do not believe the collective bargaining agreement has been violated. Article 8 - Hours of Work regulates the work week and the work day. There is no claim that the workweek provision is a guaranteed workweek for "all". Implicit in the argument is that it is guaranteed for some. The use of the term "regular" (or normal, standard, etc) has almost universally been held not to guarantee the hours set forth in the defined week. The term "regular" modifies the phrase that follows; i.e. "workweek shall consist of five (5) consecutive eight (8) hour days, ..." Had the parties not inserted the term "regular", the provision would have mandated the workweek and work day. By inserting the term "regular" the clause achieves something less.

The Article does guarantee that the normal or typical workweek will be as described. Some variation is tolerated. And so, the County would not be free to establish a permanent 32 hour work week.

Here, there was a budget shortfall. The County determined to address it with a three week (3 day) variation in the regular workweek. Once the lack of money was addressed the County reverted to, and maintained, a regular workweek. The contract does not specifically define just how much variation is permitted. I do not believe that a single incident, involving a

three-day variation violates either the spirit or the intent of the Article.

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Viewed as a layoff, I believe the same conclusion follows. Article 6 – Seniority, Section 5 – Layoff Procedure, addresses layoffs. On its face it does appear to regulate a more long term or permanent reduction in personnel. The layoff clause references “...positions to be eliminated or reduced.” Section 6-Recall, speaks to “Rehiring of employees who have been laid off...”

Assuming the clause is applicable to short term reductions in personnel/positions, it regulates the process and criteria for layoff. It does not regulate the number of positions or number of hours to be reduced. To the contrary, the first sentence vests the County with “... the sole right to determine the position or positions to be eliminated or reduced.” The County did so. It determined that all 36 bargaining unit positions would be reduced. If the Union’s position is to prevail, the determination that 36 positions are impacted would be overturned. It would then seem that someone, possibly me, would have to declare how many positions could be identified.

The County laid off 36 employees for 3 days each. This totals 108 work days. It could have selected the junior employee, and laid that person off for 6 months or so. (Assuming everyone earns the same amount of money, and the individual would qualify for Unemployment Compensation). The County could have, and considered, laying off 3 employees. This would have resulted in a 7-8 week layoff. The County considered laying off 25 employees. This would have resulted in a 4-5 day layoff. (Note: my calculations vary from those of the Highway Commissioner). Each of these options was rejected for operational reasons. For me to identify the number of employees to be laid off determines the length of time of the layoff. It inserts me into the management of the operation. It also offends the first sentence of Section 5.

The second sentence of Section 5 requires layoff in the inverse order of seniority. As a practical matter, that is what occurred. The notices all went out at once. They were all for the same period. No junior employee remained on the payroll as senior employees were laid off.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 17th day of March, 2005.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc

