BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BUFFALO COUNTY HIGHWAY EMPLOYEES

and

COUNTY OF BUFFALO

Case 76
No. 64417
MA-12893

Appearances:

Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of Buffalo County Highway Employees, referred to below as the Union.

Richard J. Ricci, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of County of Buffalo, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to resolve a grievance filed on behalf of Mike Berg, who is referred to below as the Grievant. Hearing on the matter was held in Alma, Wisconsin on March 23, 2005. The hearing was not transcribed. The parties filed briefs by April 26, 2005.

ISSUES

The parties stipulated the following issues for decision:

> Did the County violate the collective bargaining agreement when it placed the Grievant in the Patrolman position for eight months of each year?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV – MANAGEMENT RIGHTS

Section 1 The Union recognizes the rights and responsibilities belonging solely to the County, prominent among, but by no means wholly inclusive are the rights to hire, promote, discharge, or discipline for just cause. The right to decide the work to be done and the location of the work. The Union also recognizes that the County retains all rights, powers, or authority that it had prior to this Agreement except as modified by this Agreement. . . .

ARTICLE XIV - SENIORITY

Section 1 Seniority shall begin at the time of original employment and shall not be diminished by temporary layoffs . . .

ARTICLE XV – JOB POSTING

Section 1 All new or vacated positions shall be posted at each garage, shop, and/or shed for ten (10) days on a sheet of paper stating the job that is to be filled, on what date it is to be filled, and the rate of pay. Interested employees shall sign their names to this notice. Vacancies or new positions shall be awarded on the basis of experience, skill, ability, and seniority. If experience, skill, and ability of two or more employees are relatively equal, the employee with the greatest seniority shall be chosen. The employee or union can file a grievance on the Commissioner's choice. . . .

ARTICLE XVII – SAFETY

Section 1 The County shall furnish proper safety devices for all work and employees shall wear and/or use all safety equipment furnished by the County. The County shall furnish rain coats and hard hats as needed. . . .

WAGE SCHEDULE 2004

CLASSIFICATION . . .

Operator:

6. A.) Full time Operator
   B.) Seasonal Operator
   (May through Oct)
   C.) Hours of Operation Only . . .

BACKGROUND

The County hired the Grievant in June of 2000 as a grader Operator. The posting which announced the position stated that the grader Operator wage rate was "(TO BE PAID YEAR ROUND)." The 2004 Wage Schedule set the basic rate for Operator at $15.55, and the basic rate for Patrolman at $15.25.

For the construction seasons of 2000, 2001, and 2002, the Grievant worked as a grader Operator. Repaving crews are typically headed by a reclaimer, which is a large piece of equipment that contains, between its front and rear wheels, a unit that chops and grinds existing blacktop and its substrate. The reclaimer moves slowly while operating, and can be set to grind to various depths. The purpose of the grinding operation is to recycle existing road material, leaving behind the reclaimer a foundation for repaving. Typically, a road grader follows the reclaimer to prepare the foundation for paving. A paving machine typically follows the grader. Paving crews can include dump trucks. The pieces of equipment can be bunched together or can be spread over considerable distance. Throughout these construction seasons, Lorne Schultz was the reclaimer Operator.

The engine of the reclaimer is set in front of its front wheels, and the cab sits over the front wheels. The cab is shielded by a clear door, but is otherwise open. In operation, the reclaimer generates considerable dust and fumes as it grinds blacktop and road materials. Because the reclaimer moves forward slowly while recycling, dust and fumes can be concentrated. Weather conditions play a significant role in the concentration of dust and fumes. Rain will dampen and settle dust. Wind can diffuse the dust and fumes. The crew sometimes uses water to settle the dust.

In Spring of 2003, Schultz informed the Highway Commissioner, David Brevick, that he would not continue as reclaimer Operator. Brevick declined to reassign Schultz unless his request had a medical basis. Schultz responded by supplying a physician's statement, which Brevick accepted. Brevick then asked the Grievant to become the reclaimer Operator. The Grievant reluctantly agreed. He operated the reclaimer throughout the 2003 construction season, which closed in October. He repeatedly asked the County for a dust mask. The County supplied him a face-mask, which did not use a filter system other than the mask's mesh. The dust of the reclaimer operation would quickly clog the mask. The Grievant, his Foreman Dale Brodder and Brevick discussed the issue of respirators. The Grievant and Brodder reviewed a catalog of respiratory protection devices. The Grievant requested that the County purchase a cool air respirator system that passed cooled air through a filtration system prior to an operator's inhaling. The County did not purchase the system, and for the 2003 construction season, the Grievant sole respiratory protection device was a mesh dust mask.

In the Spring of 2004, the Grievant approached Brevick, indicating his desire not to return to the reclaimer. Brevick was not willing to reassign the Grievant in the absence of a

medical condition warranting the reassignment. The Grievant responded by submitting a physician's statement, dated March 12, that states:

> This patient has a hypersensitivity to black-top fumes and dust. He should be allowed to work in an environment free from these substances.

The Grievant, Brevick and Brodder again discussed the use of a respirator. Ultimately, Brevick purchased a 3M respirator system which passed uncooled air through a filtration system prior to an operator's inhaling.

In a letter to the Grievant dated March 19, 2004, Brevick stated:

> . . . Please be advised that we are aware of your hypersensitivity and that we have made accommodations to keep you out of the fumes and dust.
>
> The operation of the reclaimer will be accomplished only with hearing protection and full shield respiratory protection which has recently been acquired by Buffalo County. The 3M Respirator system meets ANSI Z87.1-1989 standards for eye and face protection.
>
> Buffalo County will expect you to operate the reclaimer and wear this protective gear during all operation when you are directly subjected to fumes or dust. . . .

The Grievant inspected the respirator, and asked Brevick if the County would purchase a cool air system. Brevick stated his belief that the County-purchased respirator should be adequate.

In a letter to the Grievant dated April 21, 2004, Brevick stated:

> This letter is to inform you that the Buffalo County Highway Department has determined due to your medical condition of hypersensitivity to fumes and dust you will be expected to operate an air conditioned truck whenever possible during the construction season. All of the equipment that you have operated or may have operated that do not have enclosed pressurized cabs was considered in making this determination. This equipment list includes the rubber tired roller, bituminous roller, compactor, motor grader, bulldozer, paver, chip spreader, oil distributor, and the reclaimer, etc.
>
> Buffalo County would expect you to operate this wide variety of equipment in your current position. The only alternative for your well-being is to shift your duties to Patrolman from March 31st through November 30th. Your position would remain as operator from December 1st through March 31st. This change will be effective at the completion of our current payroll period.

In a posting dated April 26, 2004, the County advertised the position of "Operator Class 1041(B) Seasonal Operator Mondovi Shop." The Grievant signed the posting, viewing it as the position he held prior to Brevick's April 21 letter. He was the only employee who signed the posting. On April 29, the Union filed the grievance with Brevick. The Grievance form does not state a governing contract provision, alleges the County "took away (the Grievant's) Grader Operator pay status" and seeks that the County make him whole and "let (him) do the job he was hired to do."

The Grievant again consulted his physician, who authored a statement dated May 4, 2004, which states:

> NOTE: (The Grievant) should not be exposed to smoke & fumes from <u>operating</u> the reclaimer machine. He may operate other machines.

Brevick responded to the grievance in a letter dated May 5, 2004, which states:

> . . . The management believes that even though Buffalo County has accommodated your medical condition to the best of our ability it is in your interest and the interest of Buffalo County to continue your employment operating an air conditioned truck whenever possible during the construction season. . . . There is no past practice of an employee continuing to receive operator's pay after leaving that position for whatever reason. . . .

The parties processed the grievance through the steps, and met to discuss the matter outside of the formal grievance process, but were unable to resolve it. During this process, the Union formally amended the grievance to "include the following:"

> 1. A violation of the contract because of the County's posting of (the Grievant's) position.
> 2. A violation of the contract based on the doctor's report of 5/4/04 which was presented to the Highway Committee on 5/10/04.

The Grievant filed a formal statement, dated June 3, 2004, and headed "Operation of Equipment Clarification of Medical Condition" with the Highway Committee. In it, the Grievant states he does "not have any problems operating any other machines in the vicinity of the reclaimer" and that "the medical condition" involves smoke and fumes generated by operating the reclaimer only. The statement asserts that Brevick stated he had three other employees available to operate the reclaimer, and notes that the Grievant tried, without success, to obtain County purchase of a "cool air mask." The statement concludes with the Grievant's request to "retain the position which I was hired for, Grader Operator/State Helper", noting, "I have no medical condition while operating the grader or any other piece of equipment in the proximity of the reclaimer . . . I never signed the reclaimer position."

The balance of the background is best set forth as an overview of witness testimony.

The Grievant

The Grievant first consulted his doctor in 2003 regarding a sinus problem. He did not, at the time of the first visit, associate it with the operation of the reclaimer. He had no sinus problems between October of 2003 and the start of the following construction season. He returned to his Doctor in March of 2003 because Brevick would not assign another employee to the reclaimer. After submitting the March 12 statement, Brevick noted that the 3M respirator should solve the problem and reassigned the Grievant to the reclaimer as noted in the March 19 letter. The Grievant did not try the respirator, but did not refuse to use it. Rather, he informed Brevick he would file a grievance. After receiving Brevick's April 21 letter and signing the April 26 posting, the Grievant returned to his doctor and obtained the May 4 statement.

The Grievant testified that he did not wear a mask while using other equipment, including the road grader, even when it is behind the reclaimer.

David Brevick

Brevick has served as Commissioner for roughly nineteen years. The unit includes thirty-seven employees, about half of whom are Operators. The County has more pieces of equipment than Operators, and thus Operators must be qualified for more than one piece of equipment. Brevick tries, however, to have Operators specialize, particularly regarding heavy and expensive equipment. The Grievant is a "great Operator" and the reclaimer is a $200,000 piece of equipment.

When Schultz refused to continue as a reclaimer operator, Brevick reassigned him as a Patrolman. Schultz complained that the reclaimer should have had an enclosed cab. The manufacturer of the reclaimer does not, however, offer an enclosed cab as an option. The Grievant's concerns focused on the need for a respirator. Brevick and Jim Pulkowski, a Foreman, considered the purchase of a cool air respirator. On Pulkowski's recommendation, Brevick approved the purchase of a cool air respirator. Pulkowski discovered, however, that the mask could not be run off of the reclaimer, but would require a stand alone compressor and a generator. They then decided to try another type of cool air respirator. Difficulties obtaining the unit, however, led them to consider and ultimately buy the 3M respirator. Prior to purchasing the 3M respirator, the County contacted the reclaimer's vendor and its manufacturer. Neither was aware of any hazards regarding smoke or fume concentrations. The current reclaimer operator uses the 3M respirator, and has experienced no difficulties. In Brevick's view, the move to Patrolman was not disciplinary but a reasonable accommodation of the Grievant's condition. The Grievant continues to receive the Operator rate during the construction season for the time he actually operates heavy equipment.

After receiving the March 19 letter, the Grievant refused to operate the reclaimer, but would not put his refusal into writing. This left the County with no option but moving him to the operation of equipment shielded from smoke and fumes. Brevick stated that the County never filled the position posted on April 26.

Further facts will be set forth in the **DISCUSSION** section below.

The Union's Position

After a review of the evidence, the Union argues that the Grievant, as the previous reclaimer Operator, was removed from that piece of equipment based on a physician's statement. When he ceased doing reclaimer work, the only safety device available to the Grievant was a dust mask. The County declined his request for the purchase of an ice-cooled respirator and opted to buy a cheaper respirator. Neither was available to the Grievant at the time he obtained the physician's excuse.

The County responded by essentially removing the Grievant from a previously posted position. This eviscerates the posting provision and constitutes a demotion because the Grievant "suffered a reduction in pay", violating "the job posting, seniority, management rights and wage schedule sections of the contract." The reclaimer is the only piece of equipment the Grievant does not operate, and only one of the County's Equipment Operators can operate it at any given time. The Grievant's physician's statement cannot be used as a basis to demote him. The Union concludes that the grievance must be sustained, with the Grievant being "returned to his former position" with appropriate make whole relief.

The County's Position

After a review of the evidence, the County argues that whether its response to the physician's statement violated the labor agreement is the "real issue here". Noting that the grievance lacks any citation to an agreement provision; that "the County's practice, and indeed its prerogative" is "to make assignments of certain equipment to certain employees"; that the Grievant has no contractual right to a specific assignment; that "for safety and efficiency reasons, the County tries to keep an employee on the same machine as much as possible"; and that the County has by contract and by arbitral precedent, the right to assign "(a)bsent limiting language", the County concludes that the grievance has no merit.

Beyond this, the County "acted reasonably in responding to the Employee's condition." Brevick purchased a respirator in response to the March 12 physician's statement. The respirator "was a reasonable accommodation to Grievant's hypersensitivity, which . . . would allow the Grievant to continue operating the reclaimer." Section 1 of Article XVII requires an employee to use County provided safety equipment. The Grievant refused to do so. The County did not discipline the Grievant, "but, to the contrary, endeavored to shield him from that which he complained of, namely, fumes and dust from the reclaimer." The dust generated by the reclaimer does not affect the reclaimer Operator alone but also any grader Operator following the reclaimer. Arbitral precedent confirms that an employer has the authority and the responsibility to protect employee safety.

The Grievant's refusal to even try the respirator could have warranted discipline for insubordination, but the County responded reasonably by reassigning the Grievant to an air-

conditioned truck to shield him from the fumes his physician's statement refers to. Since that assignment is to Patrolman rather than Operator, the reduction is pay is contractually appropriate. The grievance must, then, "be denied."

DISCUSSION

The stipulated issue is broad, and does not give a specific contractual focus. The parties do, however, put a series of provisions into dispute. Ultimately, the contractual focus of the grievance is Article IV, Section 1. More specifically, the determinative issue is whether the County's accommodation of the Grievant's medical condition violated its authority to "decide the work to be done" under that section.

The Union's assertion that contractual seniority rights establish a violation is not persuasive. Seniority rights are sprinkled throughout the Agreement. However, there is no cited provision which would make assignment to the reclaimer or any other item of heavy equipment a function of seniority. Article XIV is entitled "Seniority". Section 1 establishes how seniority is accrued. However, the limitations the Article places on the County's exercise of its Article IV authority focus on layoff. In any event, there is no evidence the County's reassignment of the Grievant had any impact on his seniority.

Nor do the Job Posting provisions of Article XV bear on the grievance. The initial grievance preceded the April 26 posting. The Union amended the grievance to allege an Article XV violation. The amendment cannot obscure that the posting provisions beg the issues posed under Article IV. Brevick testified that the County never filled the position posted on April 26. Even if it had, the issue is not whether the County improperly posted the Grievant's position. If the County had no right under Article IV to reassign him to Patrolman, then the posting provisions are irrelevant. His position was never vacant and thus unavailable for a posting.

Article XVII is relevant to the grievance, but affords the Union no support. The Article obligates the County to furnish "proper safety devices" and obligates employees to "wear and/or use" them. The Grievant's conduct precludes Union use of this provision to support the grievance. The Grievant's testimony supports the assertion that a mesh dust mask was not a "proper safety device." The County, however, responded to the Grievant's requests and the March 12 physician's statement by supplying the 3M respirator. The evidence establishes that the Grievant refused to try it. Ignoring this, the fact remains that the Grievant viewed his physician's statements to trump the operation of Article XVII. The assertion that a cool air respirator would have been a "proper safety device" for the Grievant has no evidentiary support. The Grievant's desire to have the County purchase one is evident. However, there is no persuasive evidence that the device would be superior to the 3M respirator. The Grievant's testimony regarding his condition points to the adverse impact of concentrated smoke and fumes. There is no evidence the cool air respirator affords superior filtration to the 3M respirator. Rather, the Grievant's testimony is that the cool air is more

comfortable, and addresses the heat of reclaimer operation. This poses two difficulties for the Union's case. The first is that the County acted to place the Grievant in a cooler operating environment to address the condition noted in March 12 physician's statement. The second is that the Grievant's refusal to try the 3M respirator leaves Brevick's uncontradicted testimony that the current reclaimer Operator uses the 3M respirator without problems as the sole evidence on its effectiveness as a safety device. Thus, Article XVII affords no support for the Union.

This focuses the interpretive issue on Article IV, Section 1. The strength of the Union's contractual position is that the County's reassignment of the Grievant constitutes discipline. If disciplinary, the reassignment demands just cause. The Wage Schedule establishes that the reassignment adversely affected the Grievant's rate of pay.

This grants a potential basis for the grievance, but the evidence does not establish a County violation. Viewed as a contractual issue, the Wage Schedule also establishes that the rate of pay for the Operator Classification can be afforded for "Hours of Operation Only". Brevick's uncontradicted testimony establishes that the County pays the Grievant for time he spends operating heavy equipment. There is no evidence the County withholds heavy equipment assignments beyond than those that expose the Grievant to blacktop smoke and fumes.

With this as background, to sustain the grievance demands the conclusion that the County did not accommodate the Grievant's condition through an appropriate reassignment, but demoted him by declining to assign him to heavy equipment which exposes him to the smoke and fumes of reclaimer operation. The evidence will not support this conclusion.

As a threshold matter, considering the Grievant's reassignment to be disciplinary poses a series of factual problems. The County did not consider the matter disciplinary. Brevick testified the Grievant was an excellent Operator, and the County's assigning and paying him for heavy equipment operation during the construction season underscores this. Beyond this, Brevick treated Schultz the same way when he requested removal from the reclaimer due to a medical condition.

More significantly, however, the attempt to make the reassignment to Patrolman a demotion rather than an accommodation demands reading the second physician's statement to contradict or at least undercut the first. Doing this may make it possible to consider the reassignment a demotion, but makes the Grievant's refusal to use the 3M respirator arguably insubordinate.

There is evidence that the Grievant's reaction to the smoke and fumes of the reclaimer was less than a significant medical condition. He operated the reclaimer for a full season, and consulted his doctor with a sinus problem he did not at first consider reclaimer-caused. This happened without use of more than a mesh dust mask. In addition, the Grievant testified that he did not wear a respirator while operating the grader behind the reclaimer. This evidence,

however, was trumped by the March 12 physician's statement, which cited a medical condition the doctor described as "a hypersensitivity to black-top fumes and dust." The relief the doctor recommended was as broad as the condition since, "(the Grievant) should be allowed to work in an environment free from these substances." The County accepted this statement and acted consistently with it. The reclaimer did not aggravate the condition, rather the materials generated by its operation did. Those materials are part of the paving process. The County removed the Grievant from exposure to those materials.

The second physician's statement, in my view, contradicts the first. The second asserts that the "smoke and fumes" which aggravate the condition are caused by reclaimer operation. Thus, it is not the work environment that is the problem, but the operation of the reclaimer. Whether or not the second statement contradicts the first, it is evident the second statement, as the Grievant's testimony, points to a condition other than "a hypersensitivity to black-top fumes and dust." Presumably, it is the concentration of these materials that cause the Grievant's symptoms. It can be assumed that working at a distance from the reclaimer would address this point. However, if this is the case, could the use of a proper safety device achieve the same result? The answer demands either a detailed understanding of the Grievant's condition or the use and evaluation of the safety device. This exposes the fundamental problem with the Grievant's position. He declined to try any device other than a cool air respirator. Beyond this, he acknowledged that his physician had no experience with reclaimer operation other than his description of its operation and his symptoms.

In sum, reading the second statement to undercut or to contradict the severity of the condition identified in the first supports the Union's contention that the County's reassignment of the Grievant to Patrolman was a demotion. However, the strength of the Union's position is undercut by the Grievant's refusal to use the 3M respirator. The parties agree that the severity of the condition identified in the first physician's statement warranted removing the Grievant from the reclaimer. If the condition is not sufficiently severe to keep him away from the concentration of smoke and fumes in the immediate environment of the reclaimer, then the 3M respirator is worth a trial. If the 3M respirator is worth a trial, his refusal to use it is, arguably, insubordinate. The use of "arguably" highlights that the County did not treat the refusal as insubordinate. Rather, it treated the refusal to underscore the severity of the condition noted in the March 12 statement. The Grievant's reassignment to Patrolman duties, other than heavy equipment operation that does not expose him to the smoke and fumes of the reclaimer, is thus an accommodation of the condition. There is no dispute that the accommodation is a reasonable exercise of the County's right to assign under Article IV, Section 1. It would not be a reasonable accommodation if the reassignment was a demotion. To reach this conclusion, however, demands the conclusion that the first statement did not identify a significant medical condition. If it did not, the Grievant's refusal to use the 3M respirator is arguably insubordinate. The grievance thus lacks a contractual basis and is denied below.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The Union's assertion that the Highway Committee wrongfully ignored a physician's medical opinion ignores that the May 4 statement does not state a medical conclusion consistent with the March 12 statement. The first statement notes a "hypersensitivity" to smoke and fumes in the paving environment. The second concludes such smoke and fumes can be restricted to the operation of a single piece of equipment. That conclusion has no evident medical basis, since the physician has no experience with a reclaimer or a paving crew. It ignores that smoke and fumes are environmental materials, the concentration of which can be affected by a number of factors including, but not limited to, reclaimer operation. Beyond this, the assertion that the County was bound to the second statement because it was authored by a physician is not persuasive. The Union would not be bound from arguing that the mesh dust mask is not a "proper safety device" under Article XVII, Section 1, simply because the County secured the statement of a physician that it was.

The Union's concern that the County should not be permitted to unilaterally lower the rates of the Wage Schedule has persuasive force. Here, however, the Wage Schedule authorizes the payment of the Operator rate for hours actually worked. More to the point, the Union's concerns ignore that the condition noted in the March 12 statement makes the Grievant's situation unique. The County acted to accommodate that condition, and the Grievant's conduct prompted the accommodation. More troubling than the Union's concern is the Grievant's refusal to use the 3M respirator. That refusal demands the conclusion that the condition identified in the March 12 statement is significant and demands accommodation. The Grievant's assertion of the second statement clouds this. If the condition is not serious, then the refusal to use the 3M respirator is suspect. The assignment of undesired work duties as a unit-wide matter should not turn on which individual employee has the most sympathetic physician.

AWARD

The County did not violate the collective bargaining agreement when it placed the Grievant in the Patrolman position for eight months of each year.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 26th day of July, 2005.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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