BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DOOR COUNTY HIGHWAY EMPLOYEES LOCAL #1648, AFSCME, AFL-CIO

and

DOOR COUNTY

Case 142
No. 63885
MA-12738

(Felhofer Grievance)

Appearances:

Michael J. Wilson, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison Wisconsin, appearing on behalf of Local 1658.

Grant P. Thomas, Corporation Counsel, Door County, 421 Nebraska Street, P.O. Box 670, Sturgeon Bay, Wisconsin, appearing on behalf of Door County.

ARBITRATION AWARD

Door County Highway Employees Local #1648, AFSCME, AFL-CIO, hereinafter "Union," and Door County, hereinafter "County," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators to the parties in order to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on February 2, 2005 in Sturgeon Bay, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on May 18, 2005, at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree as to the issues of the case.

The Union framed the issues as:

1. Did the Employer violate the collective bargaining agreement, Article 8, Section D, when it used Jay Virlee to perform overtime work without first offering the overtime work to the senior employee, Keith Felhofer?

2. If so, what is the appropriate remedy?

The County framed the issues as:

1. Did the County comply with the collective bargaining agreement, Article 8, Section D, including any past practice, when it used Jay Virlee to perform overtime work without first offering the overtime work to Keith Felhofer?

2. If not, what is the appropriate remedy?

Having considered the evidence, arguments of the parties and contractual language, I frame the issues as follows:

1. Did the County violate the Article 8, Section D of the collective bargaining agreement when it used Jay Virlee to perform North Shop winter overtime work without first offering the overtime work to Keith Felhofer?

2. If so, what is the appropriate remedy?

The County raised a procedural issue in its opening statement and in its brief; specifically whether the January 12, 14, 27 and February 3 dates of harm are untimely. In as much as this challenge is integral to the issue of remedy, I will address the County's claim within that confine.

REVELANT CONTRACT LANGUAGE

ARTICLE 1 – MANAGEMENT RIGHTS RESERVED

A. Lawful Authority: Nothing in this Agreement shall be construed as divesting the Employer of any of its vested management rights or as delegating to others the authority conferred by law on the Employer, or in any way abridging or reduced such authority.

This Agreement shall be construed as requiring the employees to follow the provisions in the exercise of the authority confirmed upon the Employer by law.

. . .

ARTICLE 7 – SENIORITY

A. Definition of Seniority: It shall be the policy of the department to recognize the seniority principle. Seniority time shall consist of the total calendar time elapsed since the date of original employment with the Employer, no time prior to a discharge for cause or a quit shall be included. Seniority shall not be diminished by temporary layoffs or leaves of absence or contingencies beyond the control of the parties to this Agreement.

. . .

ARTICLE 8 - WORK DAY AND WORK WEEK

. . .

D. Overtime: During the term of this Agreement, all hours worked in excess of eight (8) hours per day shall be paid at the rate of one and one-half (1-1/2) times the normal hourly rate of pay. In the event that an employee is called into work prior to the start of his or her normal work day, he or she shall be allowed to work the hours established for a normal work day and up to his or her normal quitting time of 3:30 p.m. Each holiday and each day of authorized absence shall be counted as a day of work, whether or not any work was performed on such day for purposes of computing time and one-half (1-1/2) pay.

Assignment of overtime shall be consistent with custom and past practice, specifically;

1. First, by seniority in classification;
2. Then, by total seniority.

Separate and distinct seniority lists, for highway and bridgetenders shall be utilized by Employer for purposes of assignment of overtime. It is the parties' intent that seniority for highway employees shall be determined by comparison to other highway department employees; seniority for bridgetenders shall be determined by comparison to other

bridgetenders; and seniority for solid waste employees shall be determined by comparison to other solid waste employees.

BACKGROUND AND FACTS

The Grievant is Keith Felhofer, a sixteen-year veteran of the County Highway Department. Felhofer currently holds the position of Class 2, Line Man and his work location is the South/Main Shop.

The County Highway Department employs 47 bargaining unit members. The members work out of either the North Shop or the South/Main Shop. During the winter, there are six individuals assigned to work at the North Shop. There is a distinct difference between the winter operations at the North Shop in comparison to the South/Main Shop. Jay Virlee has been assigned to work out of the North Shop for over three years during winter operation.

In 1999, the Union and the County entered into the following Settlement Agreement in resolution of a grievance:

> The County of Door ("Employer") and Door County Highway Department Employees, Local 1658, AFSCME, AFL-CIO ("Union") do hereby stipulate and agree as follows:
>
> A. Assignment of overtime shall be consistent with custom and past practice, specifically;
>
> 1. First, by seniority in classification;
> 2. Then, by total seniority.
>
> Separate and distinct seniority lists, for highway; solid waste; and bridgetenders, shall be utilized by Employer for purposes of assignment of overtime. It is the parties intent that seniority for highway employees shall determined by comparison to other highway department employees; seniority for bridgetenders shall be determined by comparison to other bridgetenders; and seniority for solid waste employees shall be determined by comparison to the solid waste employees.
>
> B. Ten and one-half hours (10 ½) overtime shall be timely paid to Keith Massart as and for the remedy in this grievance.
>
> C. This grievance shall be dismissed.

The issue arose again in March 2003 and two grievances were filed. Union Steward Thad Ash filed Grievance 03-2 on March 3, 2003 alleging that "Jay Virlee, a main shop employee but reporting to North shop was called in to plow snow on February 6, 2003 at

5:00 a.m. The grievant in the matter, Keith Felhofer contends he should have been called in first being he is also a main shop employee and has more seniority" in violation of Article 7, seniority and Article 8 overtime. Ex. 5

A second grievance identified as R.20 was filed by Union Steward Richard Weisgerber on March 4, 2003 alleging that on February 6, 2003 "Mr. Felhofer was not called to perform overtime" in violation of Article 7 - A, Article 8 - D, Article 10 and the Settlement Agreement in Case 116, No. 57880, MA-10767. Ex. 12

The parties met to discuss the grievances after which Highway Commissioner John Kolodziej issued the following letter to Ash on March 24, 2003:

RE: Grievance No. 03-2
Felhofer Grievance

Dear Mr. Ash:

On March 21, 2003 a Step 2 grievance hearing was held with the following in attendance: Dennis Anschutz, Rich Weisgerber, Thad Ash, Keith Felhofer, Jim Jetzke, Aaron Daubner, Joe Biwer, and John Kolodziej. Based upon the information that was presented it is my determination that the collective bargaining agreement has not been violated. Your grievance is hereby denied.

The information presented by the Union contended that management violated several provisions of the union contract when union employee Jay Virlee was directed to report to work to plow snow out of the North Shop, before Keith Felhofer.

Mr. Virlee has been assigned to the North Shop on a full time basis for the past 3 winter seasons. Mr. Felhofer is assigned to the Main Shop. As was acknowledged by the Union and described by management during the meeting, the Highway Operations have been operating with a separate seniority list for the North Shop and one for the Main Shop/South Shop for/during winter operations. This practice dates back to the 1980's or earlier. Mr. Biwer, North Shop Superintendent testified that there have been numerous occasions in the past in which he has followed the North Shop Seniority list for assigning overtime work, without taking into consideration the seniority list from the Main Shop/South Shop.

/s/
John Kolodziej, PE
Commissioner

Received by: /s/ Thad Ash 3/26/02

On March 4, 2004, a grievance was filed by Felhofer alleging that on January 12, 14, 22, 27 and February 3, 6, 10, 12, 20, 23, and 24, 2004 the County violated Article 7, Section A and Article 8, Section D when it called in Jay Vilee rather than the Felhofer for overtime. The grievance was denied by the County at all steps. At no time during the processing of the grievance did the County raise the issue that the grievance or specific dates of infractions alleged within the grievance were time barred.

The following individuals testified at hearing:

Richard Weisgerber

Weisgerber testified that he is a 29 year employee of the County highway department. Weisgerber held the Union position of Union Steward for nine years and Recording Secretary for four years ending in 2004.

Weisgerber filed Grievance R.20 in 2003 and was present at the Step 2 grievance meeting on March 21, 2003. The grievance was resolved. Weisgerber understood the County would no longer use junior employees over more senior employees. With regard to Felhofer's grievance, Weisgerber understood that after 2003 Virlee was no longer allowed to come in and work overtime prior to 7 a.m. Weisgerber disagrees that the March 24, 2003 letter from Kolodziej is an accurate representation of the resolution reached on March 21, 2003.

Thad Ash

Ash testified that he filed a grievance with the County on March 3, 2003 and was present at the Step 2 grievance meeting on March 21, 2003. Ash was a new union steward when he filed the grievance. Ash was unaware that Weisgerber had filed a grievance on the same issue. Ash testified that the parties mutually agreed at the March 21 meeting that Ash would withdraw his grievance and that Weisgerber's grievance would continue through the grievance process.

Jay Virlee

Virlee testified he was hired by the County in July 2000 and currently is a Roller Operator. Virlee does not operate the Roller during the winter. Virlee worked out of the North Shop for all winters prior to 2005 in the capacity of a utility worker since he knew the plow routes. From 2001 through 2004 during winter operations when a grievance was pending regarding Virlee working overtime, he was not called in to work overtime at the North Shop.

Dennis Anschutz

Anschutz testified that he has worked for the County for 27 years in a variety of positions and has been a union steward for 18-20 years. The Union has three stewards and it

is difficult for one steward to know what issues another steward is pursuing. Ashultz was at the March 21, 2003 meeting, but does not recall that there was more than one grievance filed.

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

POSITIONS OF THE PARTIES

Union Brief

The Union asserts the County has violated the labor agreement.

The County's proposed issue contradicts the express language of Article 8 in as much as custom and practice were negotiated by the parties as a factor in assigning overtime. By including "including any past practice" in the issue the County is engaging in gamesmanship, is disingenuous and is evidence that the existing language of Section D will not support the County position.

The language of Section D is simple and straightforward. Specifically is an adverb and the parties agreed that sub-section 2 applies to the overtime assignments before the Arbitrator. The parties thereafter identified the "specific" separate and distinct seniority lists and nowhere is the North or South shop identified. Consistent with the rule of contract interpretation, *"expression unius est exclusion alterius,"* there is no question that the County's position is not supported by the language.

Section D is clear and unambiguous and the Arbitrator must enforce the contract as she finds it. Unless the Arbitrator finds the language of Section D contains complex and confusing concepts such that the ambiguity deserves clarification, there is no need for the Arbitrator to look beyond the language of the agreement. There is no hidden meaning is this agreement. It is simple, direct and should be enforced.

County Brief

The County maintains it did not violate the collective bargaining agreement. It has complied with a binding past practice and the grievance must be denied.

First, the labor agreement provides the Union 30 days from the date of the event or occurrence to present a grievance. The grievance was filed on March 4, 2004 and therefore the alleged infractions on January 12, 14, 22, 27 and February 3, 2004 are time-barred.

The management rights clause of the labor agreement vests with management the right to assign employees at the North and South shops, to maintain separate seniority lists for the North and South shop and to distribute overtime pursuant to these distinct seniority lists during winter operations. The labor agreement does not contain any express or implied restriction

on these management rights. The County has not ceded its right to control the operational methods and it has not acted in bad faith or in an arbitrary or capricious manner.

The record establishes that winter operations are different than summer operations. The County needs flexibility because this ensures that employees are safe. Use of two seniority lists creates equity in the distribution of overtime to all qualified employees based on seniority within either the North Highway Shop or the South Highway Shop.

There is no evidence in the record to support the Union's claim that the County was avoiding the seniority provisions of the collective bargaining agreement. The County's overtime assignment decisions were made based on legitimate business considerations.

The County and Union have an established "custom and practice" as to the assignment of employees to either the North or South shop. The County maintains separate North and South seniority lists and overtime has been distributed consistent with these two separate lists. Aaron Daubner, a 29 year employee of the department, testified that North and South seniority lists have been maintained during his tenure and that overtime has been assigned based on those seniority lists. Highway Commissioner John Kolodziej confirmed Daubner's testimony.

Finally, the language of Article 8, Section D is unclear. "Classification" has different meanings in the summer and the winter. Although the language covers overtime assignments generally, it fails to address the entire situation. Therefore, it is appropriate for the Arbitrator to recognize the parties' established past practice.

Union Reply Brief

The Union first argues that the County did not raise a timeliness concerns until it was argued in the County's brief. The sole issues before the Arbitrator are those substantive issues presented and agreed to at hearing.

The Union's processing of Grievances #03-02 and R.20 are relevant and precedential. Both grievances addressed the specific issue before the Arbitrator. In terms of the County's assertion that the Highway Commissioner's letter represents the resolution of the grievances, the County is in error because mutual assent was not reached.

Seniority is the creation of the parties' labor agreement and is a mandatory subject of bargaining. The parties have limited management's rights in this regard and there is no binding past practice to assign overtime within each shop.

As to the County's contention that there is confusion as to the meaning of classification, it is not relevant because it is not contained in the clause in dispute. The parties further defined the intent of the term "classification" in the 1999 settlement which supports the Union's position.

Based on the record as a whole, the Union requests that the grievance be sustained and the remedy ordered.

County Reply Brief

The County first notes that the Union minimally argued its case in its initial brief. This only concerns the County to the extent that if the Union argues issues in its reply brief that it intentionally omitted from its initial brief, then the County requests that the Arbitrator decline to address the new issues since it would unfairly advantage the Union.

The County challenges the facts asserted by the Union. The Union witnesses do not have knowledge of the Highway Department's assignment or distribution practices during winter operations. The "30 minute response time" side letter is inadmissible and was deemed so by the Arbitrator. As to the assertion that Virlee was ordered to no longer perform overtime, it never occurred and Virlee continued to work overtime consistent with the asserted past practice.

The evidence supports the fact that Grievances 03-02 and R.20 address the issue in the case and was resolved in writing. These written resolutions are compelling and are consistent with the County's position.

For the reasons set forth herein and in the County's initial brief, the grievance must be denied.

DISCUSSION

This case presents the issue of how overtime was intended to be assigned. The parties agree that Article 8, Section D governs the instant dispute, but disagree as to the meaning of the language. The Union argues that the language is clear and that seniority, total seniority in this instance, is the only factor the County should have considered in offering overtime. Alternately, the County maintains that the "custom and practice" need be considered in conjunction with seniority. The dominant rule is that if the meaning of a contract clause can be ascertained by the plain language of the agreement, then there is no need to look beyond the agreement and consider extrinsic evidence. Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2003) p. 434-436. Thus, I will start with the language of the agreement.

Article 8, Section D states:

> Assignment of overtime shall be consistent with custom and past practice, specifically;
>
> 1. First, by seniority in classification;
> 2. Then, by total seniority.

> Separate and distinct seniority lists, for highway and bridgetenders shall be utilized by Employer for purposes of assignment of overtime. It is the parties' intent that seniority for highway employees shall be determined by comparison to other highway department employees; seniority for bridgetenders shall be determined by comparison to other bridgetenders; and seniority for solid waste employees shall be determined by comparison to other solid waste employees.

I concur with the Union that this language is clear and unambiguous, but reach a different conclusion. The first sentence establishes that the parties expressly incorporated past practice and custom, in addition to seniority, into their overtime assignment process. This is not a strict seniority clause as the Union asserts; a strict seniority clause would allow seniority to be the only factor considered by the County. That is not what the parties bargained. These parties have bargained that overtime is to be assigned based on both custom and practice and by seniority, in classification and in total.

The Union points the Arbitrator to the word, "specifically" in Section D and asserts that this reference means that the parties intended seniority to be of greater significance than "custom and practice". I disagree. If the parties had intended for seniority to be the determining factor, then there was no reason to include the phrase, "custom and practice" in this section of the agreement. Having included the phrase, it must be given meaning.

Having found that the custom and practice of the parties is relevant, it is necessary to determine whether the parties have an established custom and practice that is binding on this situation. The County asserts that a binding past practice of maintaining separate seniority lists at the North Shop and the South/Main Shop and assigning overtime by seniority at each shop exists. The Union challenges the existence of such a practice. There are three elements necessary to find a binding past practice. Id at 608. To be binding on both parties, there must be clarity, consistency and acceptability. Id. The record establishes that a binding past practice does not exist for purposes of assigning overtime.

The first grievance that arose on this issue, in 1999, was resolved by replicating the language of the labor agreement in a settlement agreement and paying employee Massert, who I infer was the grievant, the monies that he would have received had he been called for the overtime. Nowhere in that Settlement Agreement is there any indication that the County had not complied with the agreement nor is there any indication that the grievance lacked merit. Rather, the parties reached an agreement the content of which could be no more than a resolution to a situation without taking a position on the merits. Alternately, it could be an affirmation that the County violated the labor agreement without stating it as such. Either way, the agreement does not give credence to either the County or the Union's position.

The second incident occurred in 2003 and resulted in two grievances being filed. The record includes a letter dated March 24, 2003 from the Highway Commissioner to Union Steward Ash denying the grievance and articulating that the parties have utilized the North Shop seniority list and South/Main Shop seniority list "since the late 1980'." Whether the assertion that County utilized this system back to the "late 1980's" is true or not, the fact of the matter is that as of 2003 the County reduced to writing what it perceived its practice to be and the Union did not challenge the assertion.

Thus, it is reasonable to conclude on this record that the County has created and maintained a North Shop seniority list and South/Main Shop seniority list at least since 1999 and quite possibly back to the late 1980's. The fact that two seniority lists existed does not create a binding practice in this instance because the County did not consistently utilize the North Shop seniority list to assign overtime. The evidence establishes that there were occasions since at least 1999 when the County deviated from the North Shop seniority list for purposes of offering overtime. The testimony of Virlee, Daubner and Kolodziej confirm that the County did not call Virlee for overtime when there were grievances pending on the issue of whether he or someone else was contractually entitled to the offer of overtime. This clearly occurred in 2003 and both Virlee and Weisgerber testified that it occurred on more than one occasion. The County maintains that a past practice exists, but the evidence indicates that the County unilaterally changed that "practice" at those junctures when it was faced with a grievance. As such, the County has not established that is has consistently utilized the North Shop seniority list and the South/Main Shop seniority list for purposes of offering overtime in a consistent manner and therefore binding past practice on the parties does not exist.

Having found that the parties do not have an established custom and practice, the language of Article 8, Section D and specifically, the seniority provision, is applicable to this situation. Neither party has argues that sub-section 1 should be considered. The County argued that classification, in this context, is an unclear term and the Union maintains that sub-section 2 applies. The second paragraph of Article 8, Section D divides the employees into three classifications; highway, bridgetenders and solid waste personnel with two seniority lists, highway and bridgetenders. The County's seniority list does not differentiate between highway, bridgetender and solid waste. Virlee is the 43rd most senior employee in the Highway Department while Felhofer is listed 24th on the seniority list. As such, Felhofer is more senior than Virlee and was therefore entitled to overtime prior to Virlee.

The remedy in this case is to compensate Felhofer for all dates in which Virlee was called in for overtime and Felhofer was not. Although payroll data was received as evidence in this case, some of those exhibits are illegible. Moreover, the payroll data does not sufficiently demonstrate that on the dates Virlee worked and received overtime, that work was North Shop call-in work and that Felhofer was available for work and not already working overtime. As such, I remand the issue of remedy to the parties to identify all dates alleged in the grievance that Virlee worked and received overtime pay for North Shop call in winter operation work, which Felhofer was available to work, and would have otherwise worked had the County followed the seniority list.

As to the County's assertion that some of the dates alleged in the grievance are untimely, the County did not raise any timeliness concerns until its opening statement at hearing. The timeliness challenge was waived.

ORDER

1. The County violated the collective bargaining agreement, Article 8, Section D, when it used Jay Virlee to perform North Shop winter overtime work without first offering the overtime work to Keith Felhofer.

2. The appropriate remedy is to compensate Keith Felhofer for lost overtime wages and benefits for any and all of the dates January 12, 14, 22, 27 and February 3, 6, 10, 12, 20, 23, and 24, 2004 that Felhofer was the most senior highway employee available, but not called in to work overtime. Felhofer is not required to perform any work to receive this overtime pay.

Dated at Rhinelander, Wisconsin this 31st day of August, 2005.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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