

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LANGLADE COUNTY

and

**LANGLADE COUNTY HIGHWAY EMPLOYEES
LOCAL 36, AFSCME, AFL-CIO**

Case 113
No. 69773
MA-14735

Appearances:

John J. Prentice, Attorney, Simandl & Prentice, S.C., 20975 Swenson Drive, Suite 250, Waukesha, Wisconsin 53186, appearing on behalf of Langlade County.

Dennis O'Brien, Staff Representative, AFSCME, 5590 Lassig Road, Rhinelander, Wisconsin 54501, appearing on behalf of Langlade County Highway Employees Local 36, AFSCME, AFL-CIO.

ARBITRATION AWARD

Langlade County (County) and Langlade County Highway Employees Local 36, AFSCME, AFL-CIO (Union) are parties to a collective bargaining agreement covering contract years 2008-2010. (Contract). The Contract provides for final and binding arbitration of grievances arising under the Contract.¹ On April 12, 2010, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission) regarding the County's decision not to pay Grievant at the higher Range 1A pay rate for hours worked rewiring a truck on November 20 and November 24, 2009. The Request to Initiate Grievance Arbitration asked that the Commission designate a Commissioner or member of its staff to serve as arbitrator. The undersigned was designated. Hearing was held on the grievance on July 21, 2010 in Antigo, Wisconsin. The hearing was not recorded or transcribed. The Union and County then submitted post-hearing written arguments in support of their positions, the last of which was received on November 22, 2010, closing the record in the matter.

¹ The grievance procedure provides that "the arbitrator shall modify, add to or delete from the expressed terms of the Agreement." Assuming that this unusual wording is not the result of a scrivener's error, for the purposes of this award I will exercise the authority under this provision to add the word "not" in front of the word "modify."

Now, having considered the record as a whole, I make and issue the following award.

ISSUE

The Parties were unable to stipulate as to the formulation of the issue to be decided and authorized the undersigned to frame the issue. The Union submits that the issue should be framed as:

Was the grievant paid at the proper rate for work performed in the Langlade shop on November 20th 2009 and November 24th 2009? If not, what is the appropriate remedy?

The County submits that the issue should be framed as:

[Is the Grievance procedurally arbitrable?]²

Did the County violate the Collective Bargaining Agreement when it failed to pay the Grievant the Range 1A rate of pay for work performed wiring Truck No. 5 on November 20, 2009 and November 24, 2009? If so, what is the appropriate remedy?

After reviewing the record and arguments, I frame the issues to be decided as follows:

1. Whether the Grievance is procedurally arbitrable.
2. Whether the County violated the Contract by not paying Grievant at the Range 1A wage rate for hours worked rewiring a truck on November 20, 2009 and November 24, 2009. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 7 – GRIEVANCE PROCEDURE

- A. Definition: Any difference or misunderstanding which may arise between the Employer and the employee, or the Employer and the Union shall be handled as follows:
- B. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

² Although not specifically included as a proposed issue in the County's brief, the County presented this issue at the start of the hearing. Both the Union and County presented evidence on the procedural arbitrability issue and argued its merits in their briefs.

- C. Settlement of a Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied and do not appeal to the next step within the time limits provided.

- D. Step 1: The Union Committee and/or the Union Representative shall present a written grievance to the Commissioner within ten (10) work days from the date of the occurrence giving rise to the grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later.

- E. Step 2: If the grievance is not settled at the first step, the grievance shall be presented in writing to the Personnel Committee within ten (10) work days of the receipt of the written decision of the Highway Commissioner. A meeting to discuss the grievance shall be held at a mutually agreeable time following the written request from the Union. The Personnel Committee shall respond in writing within ten (10) work days after said conference.

- F. Arbitration:
 - 1. Time Limit: If a satisfactory settlement is not reached with the Personnel Committee, the Union must notify the Personnel Committee in writing within fifteen (15) work days that they intend to process the grievance to arbitration.

 - 2. Arbitrator Selection: Any grievance which cannot be settled through the above procedures may be submitted to arbitration. Either party may request the Wisconsin Employment Relations Commission to appoint a staff member to serve as arbitrator to hear and decide the unresolved grievance.

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ARTICLE 13 – HOURS OF WORK AND CLASSIFICATIONS

...

- D. Any employee that performs work in a higher classification shall receive the rate of pay for that classification. If he/she is performing work in a lower classification, he/she shall receive no lower than his/her regular classified rate.

...

ARTICLE 19 – WAGES AND CLASSIFICATIONS

- A. Appendix A, “Classifications and Wages”, attached hereto and made part hereof, shall be the minimum in effect for the life of this Agreement.

...

ARTICLE 22 – MISCELLANEOUS

...

- D. No employee will receive the Range 1A rate of pay unless the employee is holding the mechanic or welder position on a permanent basis, or the employee has been specifically assigned to the mechanic or welder position by the Highway Commissioner or designee in writing. If the assignment conditions are met, an employee temporarily so assigned will be paid the Range 1A wage rate in accord with the terms of Article 13, Paragraph D while assigned to the position.

...

APPENDIX A
WAGES AND CLASSIFICATIONS

Langlade County Highway Department

		<u>1/1/08</u>	<u>1/1/09</u>	<u>7/1/09</u>	<u>1/1/10</u>
<u>Range 1A</u>	(Range 1 rate plus \$.25)	\$18.45	\$18.82	\$19.01	\$19.58
	Mechanic Welder				
<u>Range 1</u>		\$18.20	\$18.56	\$18.75	\$19.31
	Sign Man Parts Man Gas Man Bulldozer Operator Scraper Operator Loader Operator				

Paver Operator

Backhoe Operator
Screed Operator
Grader Operator
Paint Machine
Operator
Roller Man

...

BACKGROUND

The facts involved in this matter are largely uncontested. The Contract provides a wage and classification schedule for employees in the County's Highway Department. Within this schedule, the Department's various job classifications are arranged into broader wage ranges. The Contract further provides that employees normally assigned to a job classification in one wage range can receive pay pursuant to a higher pay range for hours that the employee works in a classification contained in the higher wage range. However, in order to be compensated at the highest Range 1A wage, Article 22, Paragraph D requires that the employee must be assigned to one of the two job classifications contained in that range – mechanic and welder – on a permanent basis, or be specifically assigned to one of those classifications by the Highway Commissioner or designee in writing.

Grievant is employed by the County as a paint machine operator, a Range 1 classification. On November 20 and November 24, 2009, Grievant worked 15.5 hours rewiring a truck. The credible evidence presented a hearing establishes that rewiring a truck is considered mechanic-level work. As a result, if the conditions set forth in Article 22, Paragraph D were met, Grievant should have been compensated for hours worked rewiring the truck at the higher Range 1A wage rate. Grievant was paid his regular Range 1 wage rate for those hours.

On December 1, 2009, a grievance was filed with the County contesting its failure to pay Grievant the Range 1A wage rate for the hours worked rewiring the truck. The grievance was not settled after it was filed at Step 1 of the grievance procedure. The Union subsequently presented the grievance to the County's Personnel Committee on January 7, 2010 where it was denied. The minutes from the meeting were then posted on January 8, 2010 by the County's Corporation Counsel. No further discussions between the County and Union were held on the grievance. On April 12, 2010, the Union filed a request to initiate grievance arbitration with the Commission, resulting in this proceeding.

DISCUSSION

I conclude that the grievance is procedurally arbitrable because the County waived any timeliness objection by not raising it before the hearing. I further conclude that the County did not violate the Contract by failing to pay Grievant at the Range 1A wage rate for hours worked rewiring a truck on November 20, 2009 and November 24, 2009 because the Highway

Commissioner or designee had not specifically assigned Grievant to perform the tasks in writing.

Timeliness

The County contends that the Union did not comply with the time limitations of the grievance procedure because the Union did not inform the Personnel Committee of its decision to arbitrate the grievance within 15 days of the Personnel Committee's decision to deny the grievance. Article 7, Paragraph F of the Contract provides that:

Time Limit: If a satisfactory settlement is not reached with the Personnel Committee, the Union must notify the Personnel Committee in writing within fifteen (15) work days that they intend to process the grievance to arbitration.

The Personnel Committee heard and denied the grievance on January 7, 2010 and posted the minutes from the meeting conveying the decision to deny the grievance on January 8, 2010. The County did not receive notice that the Union intended to arbitrate the grievance until April 2010, well beyond the 15 days provided for in Article 7, Paragraph F. After receiving the notice, the County expressed concerns internally regarding the timeliness of the notice, but it did not notify the Union of this objection prior to the hearing, which was held on July 21, 2010.

I conclude that because the County did not express its timeliness objection to the Union until the day of the hearing it waived any such objection to the procedural arbitrability of the grievance.

The prevailing arbitral view disfavors procedural objections that are not raised until the hearing. In WINNEBAGO COUNTY, Case 184, No. 43883, MA-6098 (Gratz, 1990), Arbitrator Gratz, after conducting an extensive review of arbitral authority, concluded that:

[T]he overwhelming and better-reasoned view of arbitrators holds that such procedural requirements are ordinarily to be deemed waived not only by express agreement but also in other circumstances including where, as here, pre-arbitral grievance processing is engaged in without any reference to procedural noncompliance.

The most persuasive reason to adopt this view in this matter is that the parties should have an opportunity to fully discuss all issues related to a grievance prior to going to the expense of holding a hearing and preparing written arguments. In this case, had the County raised its timeliness objection to the Union during the approximately three months that elapsed between receiving the notice to arbitrate and the hearing, the Union could have reevaluated its position relative to that objection. Providing this opportunity might have had the effect of resolving the grievance without the expense of going to hearing.

I also note that the County has not argued or presented evidence suggesting that it was prejudiced in its ability to present its case on the merits of the grievance as a result of the Union's delay in notifying of its intent to arbitrate.

Moreover, the Contract does not contain express language requiring dismissal under these circumstances. The County cites two awards as support for its position that the grievance is not procedurally arbitrable because it is untimely. Both dealt with grievance procedures that included express consequences for failing to comply with time limitations. In MARQUETTE COUNTY, Case 57, No. 63686, MA-12674 (Millot, 2005), the grievance procedure provided that grievances not in compliance with the time or procedural limitations "shall be considered dropped." In D.C. EVEREST AREA SCHOOL DISTRICT, Case 62, No. 67754, MA-14007 (Gordon, 2008), the grievance procedure provided that failure to timely file or appeal a grievance "shall be deemed a settlement and waiver of the grievance." No such absolute language is contained within the grievance procedure at issue in this case.

For the reasons stated above, I find that the grievance is procedurally arbitrable and will proceed to discuss the merits of the grievance.

Merits

I conclude that the County did not violate the Contract because the Grievant was not specifically assigned in writing to a mechanic's position on November 20 and November 24, 2009.

To decide the issue requires application of two contractual provisions. Article 13, Paragraph D provides generally that employees who perform work in a classification included in a higher range of pay are entitled to that higher range pay:

Any employee that performs work in a higher classification shall receive the rate of pay for that classification.

Article 22, Paragraph D provides specific conditions that must be met in order for employees to receive the highest, Range 1A, rate of pay:

No employee will receive the Range 1A rate of pay unless the employee is holding the mechanic or welder position on a permanent basis, or the employee has been specifically assigned to the mechanic or welder position by the Highway Commissioner or designee in writing. If the assignment conditions are met, an employee temporarily so assigned will be paid the Range 1A wage rate in accord with the terms of Article 13, Paragraph D while assigned to the position.

It is a well established arbitral principle that specific contractual language governs over more general contract language. Applying that principle here, it is clear that Article 22,

Paragraph D governs in situations where an employee seeks to be compensated at the Range 1A rate of pay.

Article 22, Paragraph D provides that, in order for employees to receive the Range 1A rate of pay, they must either 1) hold the mechanic or welder position on a permanent basis, or 2) be specifically assigned to the mechanic or welder position by the Highway Commissioner or designee in writing. It is undisputed that Grievant did not hold the mechanic position on a permanent basis at the time of the grievance. Therefore, for him to receive Range 1A wages for the mechanic level work he performed on November 20 and November 24, 2009, he must meet the conditions set forth to receive Range 1A pay.

The Union argues that the Daily Work Schedule prepared by County management for November 24, 2009 ³ constitutes the specific assignment of Grievant to the mechanic's position. That Daily Work Schedule provides the following information regarding the Grievant:

**DAILY
WORK
SCHEDULE
11/24/2009**

PHONE NUMBER	#	EMPLOYEE		JOB	TIME- IN	TIME- OUT
* * *	* * *	* * *	* * *	* * *	* * *	* * *
XXX-XXXX XXX-XXXX ⁴	16 ⁵	SORANO, RUSS	5 ⁶	Shop		

There is simply no reasonable basis to conclude that the Daily Work Schedule specifically assigns the Grievant to a mechanic's position. Nor does the record include any other writing that assigns the Grievant to that position. Therefore, I must conclude that the conditions necessary for Grievant to be paid at the Range 1A pay rate for November 24, 2009 were not met. Further, because the record in this matter contains no written documentation, other than the Grievant's own timesheet, for November 20, 2009, I must also conclude that the conditions for Range 1A pay were not met on that date.

The Union also argues that the Grievant should have been paid the Range 1A wage rate pursuant to a side letter agreement reached in 1996. The side letter agreement was reached in

³ The Daily Work Schedule for November 20, 2009 was not offered as an exhibit. The testimony of the Grievant indicates that on November 20, 2009, he started work performing paint machine operator duties and was then assigned to work on the truck.

⁴ The phone numbers have been redacted for privacy.

⁵ The testimony at hearing established that this number corresponds to Grievant's position on the seniority list as of November 24, 2009.

⁶ The testimony at hearing established that this number referred to the truck number.

order to clarify the types of tasks that are performed in the shop that are not considered mechanic-level work. In relevant part the side letter agreement states:

Employees assigned to the Shop shall receive the Range I ⁷ rate. Employees shall receive their regular rate of pay for performing the following tasks:

1. Performing routine maintenance on assigned vehicles or equipment, including

...

- e. changing bulbs and fuses (if does not involve working on wiring)

...

The Union points to the first sentence of the side letter agreement to support its conclusion that any employee assigned to the shop who is not performing one of the listed duties is entitled to receive the higher Range 1A rate. In this view, the Daily Work Schedule for November 24, 2009 constitutes the assignment to work in the shop, and since wiring work is specifically excluded from the list of non-mechanical duties, it would be entitled to compensation at the Range 1A rate. I find this interpretation unpersuasive because it would render much of Article 22, Paragraph D meaningless. While the side letter agreement provides context for the types of tasks that the parties consider mechanic-level, the more specific conditions set forth in Article 22, Paragraph D govern over the more general language of the first sentence of the side letter agreement.

The Union further argues that it would be nonsensical for the County to pay a mechanic the higher Range 1A wage rate for hours spent wiring a truck and a lower Range 1 wage rate for a paint machine operator to perform the same task. In support, the Union cites to a previous arbitration award where the arbitrator summarized one of the County's arguments in that case as being that "Employees should be paid based on the nature of duties performed..." LANGLADE COUNTY, Case 77, No. 55468, MA-10023 (Meier, 1998) (Meier Award). However, the Meier Award dealt with the application of the side letter agreement and did not address the contractual language at issue here. The record in this matter does not even indicate whether the contractual language, particularly Article 22, Paragraph D, was in place at the time of that award. Therefore, I find the arguments made by the County and the conclusions drawn by the arbitrator in the Meier Award to be of little relevance to this matter.

⁷ At the time the side letter agreement was drafted, Range I was the equivalent to what is referred to as Range 1A in this award.

For the foregoing reasons, I conclude that the County did not violate the Contract when it failed to pay Grievant the Range 1A wage rate for hours worked rewiring a truck on November 20, 2009 and November 24, 2009. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 9th day of March, 2011.

Matthew Greer /s/

Matthew Greer, Arbitrator