

STATE OF WISCONSIN
BEFORE THE ARBITRATOR

In The Matter Of The Petition Of

**AFSCME LOCAL 576
ST. CROIX COUNTY HIGHWAY**

**To Initiate Interest Arbitration
Between Said Petitioner and**

ST. CROIX COUNTY

**Case 218, No. 67856
INT/ARB-11148
Decision No. 32747-A**

APPEARANCES:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
P.O. Box 364, Menomonie, WI 54752-0364, on behalf of AFSCME, Local 576,
St. Croix County Highway.

Attorney Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway,
P.O. Box 1030, Eau Claire, WI 54702-1030, on behalf of St. Croix County.

AFSCME, Local 576, St. Croix County Highway, hereinafter referred to as the Union, filed a petition with the Wisconsin Employment Relations Commission to initiate interest arbitration pursuant to Section 111.70(4)(cm) of the Municipal Employment Relations Act with respect to an impasse between it and St. Croix County, hereinafter referred to as the County. The undersigned was appointed as arbitrator to hear and decide the dispute, as specified by order of the Wisconsin Employment Relations Commission, dated May 26, 2009. Hearing was held on October 5, 2009, without the services of a court reporter. Post-hearing briefs were exchanged by December 23, 2009, marking the close of the record.

Now, having considered the evidence adduced at the hearing, the arguments of the parties, the Final Offers, and the record as a whole, the undersigned issues the following Award.

FINAL OFFER OF THE UNION**SIDELETTER OF AGREEMENT
COMMERCIAL DRIVERS LICENSE**

This agreement is entered into as a result of the new Federal Motor Carrier Safety Administration regulations and the Wisconsin Department of transportation regulations for employees who lose their CDL due to a none-work related violation.

This agreement will be for a trial period of the 2008 2010 collective bargaining agreement and shall apply only to non-probationary employees.

Any employee who receives a citation for any offence that has the potential penalty or results in the suspension, revocation or disqualification of their Commercial Drivers License (CDL) shall notify the Highway Commissioner or his designee prior to beginning their workday. Failure to comply with proper notification will make the employee ineligible for this agreement.

The Employer agrees to make a good faith effort to provide non-CDL work to an employee whose license is suspended, revoked or disqualified due to circumstances arising outside of work, provided the employee is expected to regain his/her CDL at the end of the penalty period. However, the decision to reassign work is exclusively left to the Highway Commissioner in accordance with the availability of work in the department.

If a reassignment of work is granted, the employee shall be paid the appropriate rate of pay in accordance with the Union contract.

If no work is available, the employee may request an unpaid leave of absence.

Prior to the start of an unpaid leave of absence the employee will be required to use available vacation, floating holidays and compensatory time. The employee will not accrue benefits while on the unpaid leave of absence. Health insurance benefits shall be made available to the employee through COBRA.

Once the leave of absence is granted, the employee will not be required to return to work for intermittent work assignments, unless employee makes himself available for such work.

The employer shall not be required to accommodate more than two (2) employees at a time. Union seniority shall determine who receives the accommodation. However if more than two employees require such leave of absence the Employer shall have the sole discretion to extend the leave to the additional employee(s) whose CDL is suspended, revoked or disqualified.

The period of accommodation shall not exceed 14 months. If the employee has not regained their license within 14 months, the employee may be terminated.

The employer has the authority to fill the employee position on a temporary basis during the Leave of Absence in any manner it deems appropriate.

This agreement shall not serve as precedent.

FINAL OFFER OF THE COUNTY

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COMMERCIAL DRIVERS LICENSE**

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The Employer agrees to make a good faith effort to provide non-CDL work to an employee whose license is suspended, revoked or disqualified due to circumstances arising outside of work, provided the employee is expected to regain his/her CDL at the end of the penalty period. However, the decision to reassign work is exclusively left to the Highway Commissioner in accordance with the availability of work in the department.

If a reassignment of work is granted, the employee shall be paid the appropriate rate of pay in accordance with the Union contract. Classified rate does not apply during this period.

If no work is available, the employee may request an unpaid leave of absence.

Prior to the start of an unpaid leave of absence the employee will be required to use available PTO and compensatory time. The employee will not accrue benefits while on the unpaid leave of absence. Health insurance benefits shall be made available to the employee through COBRA.

Once the leave of absence is granted, the employee will not be required to return to work for intermittent work assignments, unless employee makes himself available for such work.

The employer shall not be required to accommodate more than two (2) employees at a time. However, if more than two employees require such leave of absence, the Employer shall have the sole discretion to extend the lead to the additional employee(s) whose CDL is suspended, revoked or disqualified.

The period of accommodation shall not exceed 14 months. If the employee has not regained their license within 14 months, the employee may be terminated.

The employer has the authority to fill the employee's position on a temporary basis during the Leave of Absence in any manner it deems appropriate.

This opportunity shall be given to any employee only once during the employee's employment with St. Croix County.

This agreement shall not serve as precedent.

STATUTORY CRITERIA

The criteria to be utilized by the Arbitrator in rendering the award are set forth in Section 111.70(4)(cm)(7), Stats., as follows:

7. "Factor given greatest weight." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer.

7g. "Factor given greater weight." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified under subd. 7r.

7r. "Other factors considered." In making any decision under the arbitration procedures authorized in this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:

- a. The lawful authority of the municipal employer.

- b. Stipulations of the parties.
- c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
- d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment performing similar services.
- e. Comparison of the wages, hours and conditions of employment involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.
- f. Comparison of the wages, hours and conditions of employment of the municipal employees, involved in the arbitration proceedings with the wages, hours and conditions of other employees in private employment in the same community and in comparable communities.
- g. The average consumer prices for goods and services, commonly known as the cost of living.
- h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- j. Such other factors, not confined to the foregoing, which are normally or traditionally taken in consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

POSITION OF THE UNION

INITIAL BRIEF

With respect to the comparables, the parties agree that nineteen counties are an appropriate set of comparables. However, the County proposes the cities of New Richmond, Hudson, and River Falls as three additional comparables. The County provided no demographic or economic data to support the proposed inclusion of those cities. The County also has not introduced even one of the contracts for those proposed comparables. There is simply no basis to extend the comparable set to include these cities.

In the discussion of the loss of CDL contract language, arbitrators rely heavily on external comparisons in their determinations. Given that the parties have mutually agreed upon a comparability pool of 19 counties, the Union will analyze the proposals in terms of the underlying rationale and how the comparables apply to them.

The County proposes the following language in the Side Letter: “This opportunity shall be given only once during that employee’s employment with St. Croix County.” This language is proposed by the County because the 2005 federal Commercial Motor Vehicle (CMV) regulations increased the severity of penalties for certain categories of non-CMV related driving offenses. Significantly, holders of a CDL were no longer able to obtain an “occupational” exception to continue to drive CDL vehicles during the penalty period for the non-CDL related offenses.

The Union asks if an employee who receives an OWI while not working should lose his job because of the loss of the CDL for one year. This is why the Side Letter allows the employee fourteen months to get the CDL back. For major offenses one can

only get the CDL back one time. Therefore, under the federal regulations as a practical matter an employee could only use the Side Letter once in his career for major offenses.

The Union submits that 11 of the 19 comparables, a clear majority, do not have the limitation proposed by the County; therefore, the Union's offer should be favored.

The Union proposes the following language: "Union seniority shall determine who receives the accommodation." The purpose is to determine who, in the unfortunate event that more than two employees lose their CDLs would be retained and who would be subject to possible termination.

The Union argues that seniority and the pertinent rights are a key component of all collective bargaining agreements. The principle of seniority underlies collective bargaining. Seniority provides an employee with protection and security, among other reasons.

The concept of seniority is deeply embedded in the parties' relationship, as reflected in Article 7 of the parties' collective bargaining agreement. Of particular interest is the use of seniority for layoff. This would be analogous to the instant matter, since in the event of lack of work, under the Union's proposal, it is a seniority based determination as to who would be laid off.

While there are issues of qualifications in the bumping language under the layoff provision in the labor agreement, it is inapplicable here. First, if there is no work for which the employees without CDLs are qualified, they are then simply placed on an unpaid leave of absence. Second, under the terms of the proposal, there is no requirement that the County terminate the least senior employee (the third employee who has lost a CDL). The County is permitted, but not required, to do so.

The Union believes the County has made no showing that it should be able to choose who to terminate with no objective criteria and no just cause standard. Seniority gives an objective basis for determination for similarly situated employees. Eight of the comparables have seniority as the determining standard for who would be retained. Only six of the comparables allow the employer an unfettered right, as the County proposes here.

The Union notes the parties are in agreement on most of the provisions of the Side Letter. The parties are in disagreement over only two sentences. The parties agree to the nineteen counties as comparables, while the County proposes adding three cities, although the County has not provided any of those cities collective bargaining agreements or demographic data. Those three cities should thus be rejected as comparables.

The County proposes that an employee be able to apply the Side Letter only once during their employment with the County. The language is superfluous for major violations, because by statute the CDL can be regained only one time. For serious violations of between 60 and 120 days, the County's proposal would have a harsh and unreasonable effect.

While the parties agree that up to two employees who lose their CDLs shall be retained under the Side Letter, the Union's proposal addresses who should be retained if there are three employees who lose their CDLs. The Union believes it should be based on seniority.

REPLY BRIEF

The Union points out that the issue arose because of a change in the Federal and State statutes with respect to CDLs. Both parties have an interest in the language. The County has an extensive investment in its employees. Neither party wants to spend unnecessary time and money in arbitration cases over loss of CDL issues.

With respect to the County's arguments over quid pro quo, the Union submits that of the six interest arbitration awards involving CDL language, there was only one where the employer argued the need for a quid pro quo. Arbitrator Dichter in Monroe County, Dec. No. 32286-A (5/12/08) found a lessened need for quid pro quo because of the change in the law.

Instead, when reviewing those awards, it is clear that comparability is the determining factor used by the arbitrators. Of the two issues in dispute, the external comparables overwhelmingly support the Union's proposal.

The County's obsession with OWI cases is misplaced, for they are only a part of the CDL problem. Other issues include: following too close or speeding, among others, that result in a less than one year loss of CDL.

The Union has shown that seniority is a key component of job selection and who is retained during layoff under the labor agreement. The Union believes its proposal is analogous to a layoff and seniority should apply, instead of the County arbitrarily picking and choosing. The Union again points out that eight of the fourteen comparables support the Union's proposal. The Union submits that its Final Offer is preferred. The Union cites arbitral authority in support of its position.

POSITION OF THE COUNTY

INITIAL BRIEF

The County believes that its proposed Side Letter is a reasonable response to the Union's demand for job protection even though an employee, because of a lost CDL, could not perform most of the regularly assigned job duties. The County's proposed Side Letter includes nearly every demand made by the Union. The County asserts that the loss of the CDL is directly related to the job duties.

Thus, the fairness of losing a CDL when off duty is not the issue; the issue is its impact on the employee's ability to do the job and the reasonable accommodations the County should make if the job could not be performed.

The County has offered to make reasonable accommodations. It has agreed to make good-faith efforts to provide non-CDL work. If no work is available, the employee can go on an unpaid leave of absence for up to 14 months.

The Side Letter is a major change in the status quo. Arbitrators have relied on a number of criteria that must be met in order to change the status quo. The County considers the Side Letter unnecessary. No Highway Department bargaining unit employee has lost a CDL due to an OWI or other off duty "serious" or "major" traffic infraction. The record reflects that the County has accommodated non-bargaining unit members who have lost their driver's licenses.

While the Side Letter is unnecessary, the County agreed to the core of the Union's proposal. It agreed that it would assign non-CDL work to up to two bargaining unit employees who lost their CDLs at any one time.

The question then becomes is it reasonable that an employee be afforded this accommodation more than once in their career? The County's Highway Department employees know that they must have a CDL to perform the duties of their position and that it is their responsibility to maintain their licenses. They also know that their license will be revoked for one year if they are convicted of a "major" or "serious" traffic offense.

The federal and state governments have seen fit to penalize CDL holders who violate the law when driving their personal vehicle. The underlying public policy to control drunk driving justifies the County's limitation of only one "kick at the cat" per career. Under the Union's Final Offer there is no limitation on how many times an employee must be assigned non-CDL work or be given a leave of absence.

Under the Union's proposal, if a more senior employee loses CDL privileges at the same time to other employees who are already being accommodated, the least senior employee would be terminated (unless the County elects to accommodate more than two employees).

The Union's demand to protect most senior members is not reasonable. Should a more senior employee with disqualified CDL privileges be able to displace or cause the termination of a less senior employee who is on the threshold of receiving his/her CDL back?

The County asserts that this, in some ways, is a non-issue because not one bargaining unit employee has ever been ticketed for OWI. But mandating the protection of the most senior employee from displacement in the event two less senior employees are already being accommodated does not allow the County to consider the facts and

circumstances involving each of the three employees who lost the CDL at the same time. Moreover, mandating the protection of the most senior employee could extend the time period of the County's accommodation because, under the Union's proposal, the County could be required to terminate an employee who is nearly eligible for his/her CDL (because nearly a year has passed) to begin a new accommodation period for the more senior employee.

The Highway Department may have as many as 15 of the 65 bargaining unit members off of work on any given day due to the time off available to them under the collective bargaining agreement, state law, and federal law. That many employees who are off of work at one time is not uncommon, as the record reflects. Further, a senior employee is not without recourse in the event two less senior employees are already being accommodated. Section 9.01 provides that an employee in such a situation could request a leave of absence.

This is the first arbitration between the parties. It is therefore reasonable to rely on the comparables that have been established in cases involving other County bargaining units. The parties are in agreement that the most appropriate comparables are the 19 counties relied upon by Arbitrator Petri in his June 2007 decision involving the Health Care Center unit. Arbitrator Imes in 2002 concluded that 17 of those 19 counties, all except Polk and Dunn, were comparables in an arbitration involving the Human Services Professionals. Arbitrator Petri added that two contiguous counties because both had healthcare centers.

The Union, on the other hand, has proposed expanding the comparables to include all counties within the state, with the exception of Milwaukee County. In Arbitrator

Imes' Human Services Professional case, the Union also proposed statewide comparables. Arbitrator Imes rejected that argument. Arbitrator Imes stated: "Since there is sufficient evidence available concerning the economic condition of the County's use of the Hay study, ... there is no need for a statewide comparison to determine a reasonable list of the offers."

The County submits that this logic remains true. There is simply no need to expand external comparables on a statewide basis when there is an established group of 19 counties, all of which have language addressing what happens when a Highway Department employee loses CDL privileges. Those 19 counties relied on by Arbitrator Petri are the appropriate external comparables

A review of County Exhibit 9 and the corresponding contract language reveals that 18 of the 19 external County comparables have some language protecting at least one employee at any given time from losing their job upon loss of their CDL. The exception is Columbia County, which is awaiting an award to determine what language will be incorporated into its 2008 agreement.

The County has agreed to a very generous benefit. First, it "agrees to make a good-faith effort to provide non-CDL work." If no work is available, the employee may request an unpaid leave of absence. The limit on the number of employees required to be accommodated at any one time matches or exceeds that in 13 of the 18 counties. The two-employee maximum in the County's Final Offer matches eight counties and exceeds the one-employee maximum in five counties. The 14-month protection period matches or exceeds that of all the external comparables, except Dodge County, which allows for fifteen months.

The County's Final Offer includes the following provision: "This opportunity shall be given to any employee only once during that employer process employment with St. Croix County." That has support in 9 of the 18 settled counties. In those nine counties, employees receive no second chance.

The Union's proposed seniority language does not have the same level of comparable support. Thirteen external comparables specify the number of employees who may be accommodated. Only seven of those counties support the Union's position that seniority shall be the determining factor. As the Union's demand for protection of the most senior does not have the same level of external comparable support as does the County's proposed "one time only" provision, the County asserts the external comparables support its Final Offer.

REPLY BRIEF

While the Union accurately states that the County's "one opportunity only" language is superfluous where loss of the CDL is due to "major" traffic offenses, that provision would come into play with repeated "serious" traffic offenses.

The Union argues the one-time-only provision is excessively harsh, giving an example of losing a CDL for sixty days for driving too close then ten years later another sixty days for speeding. The Union's example misrepresents the facts. There is a sixty day loss of the CDL for a second conviction within three years of the first. There is a loss of 120 days for a third conviction within a three year period.

The County submits the Union fails to recognize the importance of safe driving. The County's proposal accommodates an employee for the first loss of CDL privileges. Termination is justified for the second offense.

The County's first-come-first serve accommodation for the first two employees with lost CDL privileges is no less objective than the Union's seniority proposal. The County's proposal does not give it unfettered rights, as the Union claims.

While the Union argues seniority is justified because it is a key component of collective bargaining agreements. However, that is only the case when the parties have so bargained. The County submits there is a fundamental difference between layoff, recall and job assignments and the Union's proposed language here. Under the Union's proposed language here, seniority is the sole factor. With the layoff, recall and job assignment provisions, the employees must also be qualified to perform the work.

In conclusion, the County submits that its proposed Side Letter provides a reasonable accommodation to those employees who lose their CDL as the result of a non-work-related, but "serious" or "major" traffic offense. The County submits that the Union has the burden of showing a need, comparable support, and a quid pro quo for its proposal. The County submits that the absence of even one employee needing accommodation during the first two years of the Side Letter's term reveals that there is no "smoking gun" and no need for the Side Letter. The County submits that the reasonableness of its proposed "one time only" language, as compared to the Union's "seniority rules" proposal is demonstrated by its greater support among external comparables. Finally, the County submits that the Union has offered no quid pro quo for either the Side Letter or the seniority proposal. The County requests that its Final Offer

be selected by the Arbitrator. The County cites arbitral authority in support of its position.

ANALYSIS

A. COMPARABLES

This is the parties' first interest arbitration proceeding; however, the parties agree to nineteen external county comparables. The agreed-to comparables resulted from interest arbitration awards in other units of the County: St. Croix County, Dec. No. 30230-A (6/25/2002, Imes), and St. Croix County (Health Care Center), Dec. No. 31703-A (6/24/2007, Petrie). Those nineteen county comparables include: Calumet, Chippewa, Columbia, Dodge, Door, Dunn, Eau Claire, Jefferson, Manitowoc, Marathon, Oneida, Outagamie, Ozaukee, Polk, Portage, Sauk, Walworth, Washington, and Wood.

The County proposes adding three cities to the roster of comparables: Hudson, New Richmond, and River Falls. The record evidence does not include particular support for adding those city comparables. I am satisfied that the previously agreed-to nineteen county comparables are sufficient for the parties in bargaining and arbitrators in the interest arbitration process to make reasoned decisions. It is therefore unnecessary in this proceeding to include the cities of Hudson, New Richmond, and River Falls.

B. MERITS

The County contends that the Side Letter is a major change in the status quo and that the Union should have offered a quid pro quo as part of its proposal. However, the reason for the proposal was that in 2005 there were substantial changes in the federal

Commercial Motor Vehicle (CMV) regulations which included an increase in the severity of penalties for certain categories of non-CMV related driving offenses. The State of Wisconsin incorporated the changes. Thus, there was a significant statutory change that directly impacted those in the bargaining unit who must hold a CDL to perform their jobs. Both parties have an interest in a Side Agreement to address the statutory changes. In these particular circumstances, then, a quid pro quo is not required.

The parties Final Offers are identical in all respects, but for two provisions. The County includes the following clause which is not included in the Union’s: “This opportunity shall be given to any employee only once during the employee’s employment with St. Croix County.” The Union’s Final Offer includes the following which is not included in the County’s: “Union seniority shall determine who receives the accommodation.”

Turning first to the County’s proposal to limit the accommodation to one time only, the following summarizes how the comparables have addressed the issue:

NO LIMITATION INCLUDED	ONE TIME ONLY
COLUMBIA, (Neither parties’ final offer limits the number of times) DODGE,, DUNN, EAU CLAIRE, JEFFERSON, MANITOWOC, ONEIDA, OZAUKEE, POLK, WASHINGTON	CALUMET, CHIPPEWA, DOOR, MARATHON (Tentative Agreement for 2009-2011 per Cty. Ex. 9) OUTAGAMIE, PORTAGE, SAUK, WALWORTH, WOOD

Thus, ten of the counties do not limit the number of times accommodation for a loss of CDL privileges will be allowed for an employee, while nine counties limit the accommodation to one time only. The comparables are, then, slightly in the Union’s favor. However, as the County points out, an unlimited number of accommodations (in some circumstances) when an employee loses CDL privileges detracts, to a certain extent, from the Union’s Final Offer.

With respect to the Union's proposal of a seniority-based accommodation, the following table summarizes the comparables as to which employee(s) with lost CDL privileges would be accommodated:

SENIORITY	FIRST COME-FIRST SERVE	MANAGEMENT DISCRETION	GENERAL ACCOMMODATION LANGUAGE	NOT SPECIFIED
CALUMET, COLUMBIA, (Both parties' final offers include seniority language), DODGE (for certain classifications), JEFFERSON, MARATHON (Tentative Agreement for 2009-2011 per Cty. Ex. 9) OUTAGAMIE, POLK, WOOD	CHIPPEWA, ONEIDA,	DODGE (for certain classifications), PORTAGE	DUNN, EAU CLAIRE, MANITOWOC, WALWORTH	DOOR, OZAUKEE, SAUK, WASHINGTON,

The table reflects that seven of the comparables have seniority-based accommodation language. However, two of those allow for accommodation of only one employee at a time (Calumet and Wood Counties). Columbia County is in arbitration with the county's final offer allowing for only one employee at a time and the union's proposal allowing for two employees. Polk County lists one local that allows two employees at a time while another local allows for only one employee. Dodge County lists some classifications that allow for a seniority-based accommodation while other classifications are not seniority based. In any event, only seven of nineteen of the comparable counties provide for some sort of seniority accommodation.

In addition, the Union has not demonstrated that there is a reasonable expectation that more than two employees would simultaneously have lost their CDL privileges. In

fact, the record reflects that historically for this County, there is a low probability that multiple Highway employees would lose their CDL privileges during the same period of time.

Moreover, an employer generally has the right to reasonably plan for staffing. Loss of CDL privileges is not similar to layoff or job posting situations. As the County notes, the other seniority-based provisions in the parties' labor contract include language requiring that the employee be qualified.

Finally, the Union's seniority approach could render a harsh result: should more than two employees lose their CDL privileges, the least senior employee could be terminated. For the foregoing reasons, I find the County's non-seniority-based accommodation to be more reasonable.

CONCLUSION

I am constrained to choose between the two Final Offers. On balance, I find the County's Final Offer to be more reasonable. The Union's Offer of limitless accommodations per employee is somewhat excessive (though it has some comparable support). More importantly, the County's non-seniority based approach is preferred for the reasons outlined above.

In that regard the undersigned makes and issues the following:

AWARD

The County's Final Offer of its "Sideletter of Agreement" shall be appended to the 2008-2010 collective bargaining agreement.

Dated in Madison, Wisconsin, on January 28, 2010, by

Andrew M. Roberts, Arbitrator