STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of	
LANGLADE COUNTY HIGHWAY DEPARTMENT EMPLOYEES LOCAL 36, AFSCME AFL-CIO	Case No. 48 No. 39784 INT/ARB-4668 Decision No. 25435-A
To Initiate Arbitration Between Said Petitioner and	
LANGLADE COUNTY (HIGHWAY DEPARTMENT)	

APPEARANCES

On Behalf of the Union: Dave Arhens & Phil Salamone, Staff Representatives

On Behalf of the Employer: Ronald J. Rutlin, Attorney - Mulcahy & Wherry, S.C.

I. BACKGROUND

On November 16, 1987, the Parties exchanged their initial proposals on matters to be included in a new collective bargaining agreement to succeed the agreement which expired on December 31, 1987. Thereafter, the Parties met on one occasion an effort to reach an accord on a new collective bargaining agreement on December 8, 1987, the Union filed petition requesting that the Commission initiate Arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act. On March 29, 1988, a member of the Commission's staff conducted an investigation which reflected that the Parties were deadlocked in their negotiations, and, by April 8, 1988, the Parties submitted to the investigator their final offers, written positions regarding authorization of inclusion of nonresidents of Wisconsin on the arbitration panel to be submitted by the Commission, as well as a stipulation on matters agreed upon. Next, the investigator attempted further mediation without success and thereafter the investigator notified the Parties that the investigation was closed; and that the investigator next advised the Commission that the Parties remain at impasse.

The Parties were then ordered on May 11, 1988, to select an Arbitrator. The undersigned was selected and was notified of his selection on July 5, 1988. A hearing was held on October 4, 1988. Post hearing briefs and reply briefs were submitted. The final exchange occurred January 4, 1989.

II. FINAL OFFERS AND ISSUES

The only proposal made by the Union is to increase wages as follows:

3%	effective	1-1-88
1%	effective	7-1-88
3.5%	effective	1-1-89

The Employer proposes a wage increase and three language changes. They propose to increase wage rates in 1988 which are 4.5% over the 1987 rates. The 1989 rates are to be increased 4.5% over the 1988 rates under their offer. Their final offer sets forth the specific rates.

Their final offer with respect to language changes is as follows:

"2. ARTICLE 6 - GRIEVANCE PROCEDURE, revise Subsection "A" - Definition to read as follows:

"A grievance shall mean a dispute concerning the interpretation or application of this Agreement."

3. ARTICLE 12 - HOURS OF WORK AND CLASSIFICATIONS, and new Subsection "G" to read as follows:

"Employees may be assigned to perform work in another classification on a temporary basis in order to maintain efficiency of County operations and for training purposes even though an employee permanently assigned to the classification is not working in the classification at the time of the temporary assignment. For purposes of this provision, temporary is defined as no more than two (2) hours. However, this definition does not apply to training situations. Employees training in a higher classification shall receive their normal rate of pay for the first three hundred and sixty (360) hours of training. Thereafter, they shall receive the rate for the classification for all work performed in the classification. This provision shall not be used to alter permanent assignments."

4. ARTICLE 20 - MISCELLANEOUS, revise Subsection "A" to read as follows:

"A. All foreman shall refrain from performing work normally done by the employees and shall refrain from operating equipment normally operated by employees, except in cases of emeregency, training, or urgent need. An emergency is defined as a sudden, pressing necessity, requiring immediate action. Snow removal shall automatically constitute an emergency situation where all qualified operators are either on the job or not immediately available. An urgent need is defined as a situation requiring timely action of a limited duration (i.e. no longer than two (2) hours) to ensure the safe and efficient operation/utilization of County equipment. The provisions of this paragraph shall not be utilized to cause a reduction in bargaining unit work or employees."

As noted, the proposed amendment to Article 12 is new language. The proposed amendment to Article 20 revised language which existed in the predecessor contract. Article 20 Section A reads as follows in 1986-87 contract:

"ARTICLE 20 - MISCELLANEOUS

A. All foreman shall refrain from performing work normally done by the employees and shall refrain from operating equipment normally operated by the employees, except in cases of emergency. An emergency situation shall be defined as a sudden, pressing necessity, requiring immediate action. Snow removal shall automatically constitute an emergency situation where all qualified operators are either on the job or not immediately available."

"ARTICLE 6 - 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."

III. ARGUMENTS OF THE PARTIES

A. The Employer

First, the County proposes the following counties and one city as external comparables: Forest, Lincoln, Marathon, Menomonie, Oconto, Oneida, and Shawano Counties and the City of Antigo. They note the Association submitted no evidence on the issue of comparability. They also note that this is consistent with the comparable pool suggested by the Arbitrator in the only other arbitration decision ever rendered in a case involving the County. Langlade County (Sheriff's Dept.), Dec. No. 22203-A (Vernon, 10/30/85).

The County recognizes it has the burden to justify the changes it is proposing to the existing language [Article 6 (A) and Article 20 (A)]. They believe they must meet two tests to justify the change: (1) A demonstrated need and (2) a quid pro quo or "buyout".

With respect to the second portion of this test they argue that their two-year proposal provides employees in the bargaining unit with significant additional wages as compared to the Union propsal and thus, is a significant "quid pro quo" for its two proposals to modify existing contract language. They draw attention to the fact that under the County's offer, the average employee would receive $526.00 more in total gross wages over the two years of the contract than that same employee would receive under the Union's offer. The County submits that on this criteria alone there is a sufficient quid pro quo for its proposed language changes.

The County adds that, in addition to the fact that their offer exceeds the Union's, their wage proposal is significantly higher than internal and external settlements. For instance, all other bargaining units in Langlade County voluntarily settled for a three percent (3%) increase effective January 1, 1988, an additional one percent (1%) effective July 1, 1988, and a three and one-half percent (3.5%) increase effective January 1, 1989. Moreover, they direct attention to the evidence which establishes that no other highway bargaining unit within the comparable pool has obtained a 9% wage increase for 1988 and 1989. The same is true, with one exception, for public employees generally in the comparable group. Their offer also exceeds the cost of living.

Regarding the need for a change in the existing language, they claim they have met their burden to establish a need for a change in the current contract which restricts foremen from performing bargaining unit work. Basically, they have added to the existing language two exceptions to the prohibition of supervisors doing bargaining unit work. These exceptions are training and urgent need which is also defined in their proposal.

The County draws attention to the fact that there have been numerous grievances filed and numerous other occasions where the Union has insisted that supervisors be prohibited from performing bargaining unit work even though the amount of work involved was minimal and the impact on County efficiency and productivity would have been significant. They review some of the grievances and state that as a result of the grievances filed and numerous other situations that have arisen over several years, they are proposing to include the concept of "urgent need" as an additional

exception to the prohibition of foremen performing bargaining unit work. The County argues it is their obligation to perform its' functions as economically and efficiently as possible and their language seeks to allow them to fulfill this obligation to operate efficiently, economically, and productively. This is instead of being constantly challenged by the Union in situations where a foreman performs bargaining unit work of a limited duration for purposes of efficiency or safety. As protection to the employees, they have included a clause that provides that "the provisions of this paragraph shall not be utilized to cause a reduction in bargaining unit work or employees."

Further, they argue this proposal is needed to eradicate a constant source of friction. The County does not believe it should be forced to go to arbitration to assure that it can take reasonable action and have a supervisor do some "bargaining unit" work under limited circumstances to maintain efficiency, particularily when it has offered some protection. It does not make sense to them to bring a bargaining unit employee in from another part of the County to perform work of limited duration which can be more efficiently performed by a supervisor when a bargaining unit employee is not available. Thus, the County submits that, based upon the longstanding friction on this issue, the obvious potential for efficiency and productivity, and the narrowness of the exception submitted by the County, a compelling need has been established for a change in Article 20 (A) of the existing contract.

Next, the County addresses their proposal to revise the definition of a grievance. The need for this change is based upon internal and external comparables. In this regard, they note the proposal submitted by the County is identical to the language contained in the other two labor agreements in Langlade County. It is also consistent with all of the externable comparables. Additionally, they argue that they are not trying to remove past practice, where one is established, as an enforceable matter under the grievance procedure.

Regarding their proposal to add new language under Article 12, they state that this is merely an attempt by the County to clarify its right to assign work to employees within the bargaining unit. This right already, it is argued, exists under Article 3 (Management Rights) and Article 12 (E). They detail why they think they already have this right.

Again, they argue, language is proposed to resolve disputes that have arisen in the past and they submit two examples of grievances that have been filed in the past. They maintain that its proposal provides a reasonable

balance between Management's rights to assign work and the posting and seniority rights of the employees. Finally, the provision specifically provides that its provisions will not be used to alter permanent job assignments. They do not believe that they are proposing an unreasonable intrusion upon the rights of the employees. It is merely asking for flexibility to operate efficiently and productively in the best interests of the County and its taxpayers.

B. The Union

The Union first addresses the Employer's proposal to change the definition of a grievance in Article 6. On its face, they recognize the change is innocuous. To make their point, when they ask rhetorically what, besides interpretation or application of the agreement, can be arbitrable? However, the Union suspects that the Employer is attempting to exclude past practice as a grievable issue. Additionally, the Union does not believe that the Employer has demonstrated a need for the change in Article 6. Moreover, the mere fact that comparability supports the change is insufficient, in their opinion, to overturn language which was voluntarily agreed to by the Parties. They cite a number of cases which they believe support this view. In fact, they note that where employers have specifically proposed that language be included which provided that no consideration be given by grievance arbitrators to past practice, arbitrators have uniformly rejected the notion.

The Union next addresses Article 12. Their primary objection to this language involves the portion relating to maintaining the "efficiency of the County operations". They take this to mean that the Employer can, at any time under this language, remove a regular operator from his/her posted and permanent classification to some undefined (and possibly less preferred) job. For example, there may be an employee whose seniority has allowed him to post, qualify and be awarded an equipment operating position. However, the Employer could (even if there is work to do for an equipment operator) assign this employee to two hours of the undesirable chore of snow fence laying. Thus, they fear the Employer could then assign the employee's regular assignment to his brother-in-law or some foreman's pet. They also question the "two hour provision". They recognize that Commissioner Paul Schuman indicated in his testimony that the intent of this provision was to allow these assignments once per day. However, they ask, based on the language, who is to say that this two hours doesn't mean two hours per occurrence?

They also submit that the Parties have lived for 23 years without the language now proposed by the County. Yet, there is no evidence which indicated that training needs were not met and no evidence of efficiency or productivity problems. Moreover, there is no evidence that circumstances have changed which warrants this language after over two decades without it. Thus, they conclude that the Employer has not demonstrated a compelling need for the change.

The Union acknowledges that the modification to Article 20 relates to adding an additional exception to the prohibition against supervisors doing bargaining unit work. The exception would be for "urgent need". They are concerned about the ambiguity in the definition of urgent. Again, they ask does the two hour duration mean two hours per occurrence, per day, per week? This ambiguity would also make it next to impossible and highly impractical to police the agreement in their opinion. The Union believes that almost anything could be termed an "urgent need."

IV. OPINION AND DISCUSSION

Certainly there is nothing unreasonable about the Union's offer. It is internally consistent with other bargaining units. This is extremely important where an employer has multiple bargaining units. Moreover, there is no evidence that the Union's salary offer is inconsistent with external comparables or with any other statutory criteria.

The real focus of this case is whether the Employer has justified its language proposals. For reasons to be explained below, it is the Arbitrator's conclusion that the Article 6 proposal is palatable but the Article 12 and 20 proposals are not justified on the basis of this record.

Beginning with the Article 6 change, the Arbitrator, to put it simply, views the changes as "no big deal". As the Union said, 'what other than an interpretation or application of the labor contract could be arbitrable?' The grievance procedure itself implies it is a contractual mechanism for resolving disputes concerning the subject matter of that contract. Moreover, any arbitration award must draw its essence from the collective bargaining agreement. Therefore, an Arbitrator would have no authority to consider anything outside the four corners of the contract. Nothing else would be arbitrable.

Accordingly, the Article 6 change really isn't substantive. Given the nature of other contracts in the County, internal consistancy is enough to justify what really is just clarification/clean-up. This is not a wolf

in sheep's clothing or a "trojan horse" as the Union suggests. No Arbitrator in his or her right mind -- although little in life is guaranteed -- would interpret this change to preclude past practice from being enforced, if such a practice met the necessary test to be controlling. The Employer clearly conceeded this in the reply brief.

The Article 20 and 12 changes, in contrast to the Article 6 proposal, are substantive. The burden to justify these proposals, as the Employer recognizes, is theirs. The Employer suggests they can meet the necessary test by demonstrating a need and offering a quid pro quo. The Union counters that the need ought to be compelling and the quid pro quo significant. This important consideration is derived from criteria (J), which states:

> "j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, factfinding, arbitration or otherwise between the parties in the public service or in private employment."

In collective bargaining -- that without the artificial safety net of interest arbitration -- changes in important facets of an existing agreement don't get changed unless, to put it plainly, there is a damn good reason to and the price is right. Sometimes they get changed because one party is willing to suffer the cost of a strike to make a gain or to gain a concession.

Thus, it is well established that Arbitrators should be reluctant to make changes in fundamental language items. Such basic alterations to previously agreed upon aspects of the Parties agreement should, whenever possible, be made through voluntary bargaining. Certainly, voluntary agreements aren't always possible and the Arbitrator is left to decide what the Parties should have agreed to or most likely would have agreed to, but for the interest arbitration impasse procedure.

How compelling of a need and how big a price is a judgement call. It is relative to the nature and extent of the change, as well as to the nature and status of the rest of the agreement. It is the proverbial judgement call. Basically, the question is whether the whole smorgasboard of factors which are considered in inspiring a party to accept a basic change in an agreement are appealing enough that the Arbitrator is objectively convinced that in most cases the adversary party would accept them.

In this case, one of the reasons the Employer cites for needing a change for Article 20 and Article 12 is the fact that grievances have been filed on each of these subjects. Well, there simply isn't any crime in and of itself for the Union to seek enforcement of the labor agreement as they see it. The fact there are grievances may not have anything to do with the need to change the agreement but may relate simply to the fact that supervisors don't know what the contractual restrictions are or don't care.

Certainly, some contract language may be so poorly written that it causes disputes in and of itself but the language in question isn't, per se, defective. Thus, little need is demonstrated in this regard. This isn't to say that it isn't understandable why the Employer wants more discretion yet such is the nature of labor agreements. Unions, in order to receive what they believe to be adequate measures of job security, limit Management's discretion to some extent. However, based on the lack of comparable support for the Employer's language, there is no reason to believe that Langlade County's management discretion is anymore limited than any other county has voluntarily allowed theirs to be. It is also noteworthy that the Union has, through the vehicle of bargaining, made certain accommodations when situations present themselves. It is recognized as well that there may be animosity and frustration between the Parties. However, no Arbitrator and no written contract language can change this or make their relationship more productive for each party.

The Employer also appealed to the need for increased efficiency. Yet, it hasn't demonstrated that the present language, with respect to supervisors doing work or employees working between classifications, is unacceptably unreasonable or inefficient. In this regard, we note there is no evidence to suggest that other comparable employers have found what appears to be fairly typical accommodations for seniority and job security to be so onerous to cause them to change their agreements. It would be helpful in demonstrating a need for these changes to show that other employers are entitled to the same rights under their labor agreement. This would suggest an objective collective consensus that such rights are necessary. There is no such evidence.

Another factor is the extent and impact of the change in 20 (A). An "urgent need" is an extremely broad term as defined. Hardly a day would go by that some efficiencies might be effected if a supervisor could do bargaining unit work. Thus, the distinction observed in most contracts between supervisory work and bargaining unit work would be virtually obliterated. This would be very novel and unusual.

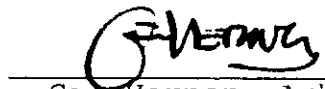
Another bothersome thing about the Article 12 proposal was the fact that the Employer tried to justify it, on the basis of merely clarifying a right they already had. However, this right isn't readily apparent. The Arbitrator isn't saying that Article 3 already gives or doesn't give the right to temporarily transfer between classifications. What he is saying is that interest arbitration isn't the proper vehicle to seek a determination of one's rights under a contract. That's the function of the grievance arbitrator. After all that's why grievance arbitration is also called "rights" arbitration.

The Arbitrator also weighed against the Employer the fact they were seeking not one but two pretty significant changes in the face of a pretty modest quid pro quo, approximately an additional 1%/year or $22/month in wages. The modesty of the quid pro quo would be even more apparent if it is true, as the Union says, that they are in a catch-up position.

In summary, the Arbitrator isn't convinced that the combination of whatever need exists for the Employer's changes and the quid pro quo is sufficient to justify the impact of an involuntary change in some relatively fundamental aspects of the Parties' agreement.

AWARD

The final offer of the Union is accepted.



Gil Vernon, Arbitrator

Dated this 24th day of February, 1989 in Eau Claire, Wisconsin.