

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 MANITOWOC COUNTY HIGHWAY DEPARTMENT : Case 253
 EMPLOYEES, LOCAL 986, AFSCME, AFL-CIO : No. 46776
 : MA-7063
 and :
 :
 MANITOWOC COUNTY :
 :

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. Alan M. Levy, Lindner & Marsack, S.C., Attorneys at Law, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1989-1990 collective bargaining agreement which calls for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the grievance of Charles Handl regarding leave time for Union activity. The undersigned was appointed and held a hearing in Manitowoc, Wisconsin, on March 12, 1992, at which time the parties were given full opportunity to present their evidence and arguments. The parties completed filing briefs on June 8, 1992.

ISSUE:

The parties stipulated that the following issue is to be decided by the Arbitrator:

Did the Employer violate the collective bargaining agreement by refusing to grant Union leave to Charles "Skip" Handl for the date of September 16, 1991? If so, what is the remedy?

CONTRACT LANGUAGE:

ARTICLE 24 - LEAVES OF ABSENCE

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C. Leaves for Union Activity: Members and officers of the Union shall be granted unpaid leaves of absence to attend and participate in Union conventions, conferences, seminars, training and education sessions. The Department Head can require that the number of employees granted such leave at any one time does not impair the operation of the department. The employee shall notify his or her Department Head three (3) days prior to the date of the requested unpaid leave of absence.

BACKGROUND:

This grievance is over the denial of a request for unpaid leave for union business. The Grievant is Charles "Skip" Handl, an employee with the County Highway Department for 35 years. Since 1978, Handl has been assigned to the

position of center striper and sign man. He is active in union affairs and is a vice president of the executive board of Wisconsin Council 40, AFSCME, AFL-CIO. Handl asked for unpaid leave for September 16, 1991 1/ to attend a committee meeting of Council 40, and his request was denied on September 6th by Robert Braunel, the Patrol Superintendent for the Highway Department. Braunel made the decision with William Schramm, the Highway Commissioner. Braunel stated that he told Handl that he could not take more time off until the center striping work was done, and that there was a heavy workload in the Department. Handl stated that Braunel told him that there were too many men off that day. Four employees were scheduled to be off that day. Braunel's records show that from three to six people are usually off during that time of year on a given day.

On October 31st, the County responded in the third step of the grievance procedure, denying the grievance and noting the following:

During the 3rd step grievance meeting Bob Braunel, Road Superintendent, indicated that the Highway Department was waiting for Fond du Lac to come and do the center striping and any request for time off during that two-week period would have been denied. It was also indicated that Skip had already taken 12 days for union activity with 8 more being requested. I think the County has been more than fair and can show that whenever possible the requests for time off are granted.

The center striping operation involves equipment owned by Fond du Lac County, and this equipment is used to paint the center stripe, no-passing zones and edge lines on roads. The painting machine requires a driver in front and an operator on the back, plus a truck which follows the painting machine and hauls extra paint. An operator from Fond du Lac County runs the controls on the back of the machine, and Handl normally drives the equipment. Someone from the Highway Department in Manitowoc drives the paint supply truck. It is Handl's understanding that when he has been absent, John Heran, another employee, has driven the painting machine. Heran has also driven the painting machine about one-fourth of the time when Handl has been on the crew, when Handl and Heran have switched their driving duties.

The Fond du Lac equipment is in Manitowoc County for painting for about 18 to 24 days a year. Handl estimated that there was an adjustment of the striping operation about three times in the previous year due to his absences for union activity. Handl usually worked out arrangements for scheduling the painting machine with the Fond du Lac operator, who was apparently able to accommodate Handl. Handl asked the Fond du Lac operator about the date of September 16th, and the operator had no problem adjusting his schedule, as he paints in four or five other counties plus some townships and some state highways. The Fond du Lac operator has also initiated an adjustment of the road painting schedule on occasion.

By the end of the summer season, many roads in the counties have been resurfaced and need the center stripe or edge lines painted on them. The County had put a seal on 50 miles of roads during the last week of August, and those roads needed the stripe to make them safe. Due to the lateness of the season, Braunel sensed some urgency to get the equipment back into the County and to get the work done in order to get rid of hazardous areas with blind

1/ All dates will be for the year of 1991, unless otherwise stated.

spots, where center striping directs the public.

Toward the end of August, Braunel asked Handl when the Fond du Lac operator would be returning, since the equipment had not been in Manitowoc since early August. Handl did not have a specific date for the return of the equipment from the Fond du Lac operator. On September 12th, Braunel contacted Fond du Lac operator, who told him that the equipment would come to Manitowoc County on September 16th. Braunel was concerned that if the County declined to use the Fond du Lac equipment when it was available, the County would wait three to five weeks before it became available again. Once the Fond du Lac equipment arrived, the painting work continued through October 4th.

The painting machine could have been used on September 16th without a supply truck following it, as the crew worked on seal coated or recently blacktopped roads and had sufficient paint to run the whole day on town roads without resupplying the paint.

Braunel was not aware that Heran drove the equipment and had not granted Heran the authority to do so. Braunel spends up to six hours a day in the field, and has an assistant superintendent and five foremen in the field on a daily basis. The assistant superintendent, Fritz Emme, came out on a job when Heran was driving the painting equipment, according to Handl. Handl did not specifically tell Braunel that Heran was driving the painting machine. Braunel considers Handl the only person qualified by job description and experience to drive the painting machine, and does not consider Heran to be qualified for that job. It is important that the equipment be driven at the right speed in a straight manner, and Braunel considers Handl to have the special experience needed to handle the job correctly.

Handl took 11 and one-half days off without pay in 1989 for union business. In 1990, he took 27 days off without pay, and in 1991, he took 18 days off without pay. The County discussed the amount of time off with him during evaluations. Schramm told Handl that the amount of time that he took off was a problem. The County always accommodated Handl in allowing him the time off.

THE PARTIES' POSITIONS:

The Union:

The Union argues that it does not impair the Department's operations to grant union leave where arrangements could be made in adjusting the painting schedule, and that management does not have a basis to deny leave in this instance. While Braunel told Handl that he was denied leave because there were too many men off that day with four employees off duty, it is common for four to six employees to be off of work on other Mondays in September. Moreover, it was not until the third step of the grievance when the County raised the issue of Handl's skills being needed. Another qualified driver, Heran, was available on September 16th. The Union does not believe that Department supervisors were not aware that Heran had substituted for Handel on the painting equipment.

The Union notes that Handl had adjusted the painting schedule in the past, as had the Fond du Lac operator. When Braunel called the Fond du Lac operator on September 12th, it was three days after Handl grieved the denial of union leave and six days after Braunel denied the leave. The Union asserts that the County was not straight forward in stating its reason for the denial of leave, or it changed its basis for denial for the sake of argument. Also, the County did not assess its resources to determine whether its operations would be impaired by Handl's absence.

The County's assertion that there is no remedy gnaws at the root of the collective bargaining agreement. Where there is a right, there is a remedy, and where a right is purportedly granted but no remedy awarded, the right is meaningless. Thus, the Union asks that the Arbitrator find that the County violated the bargaining agreement and sustain the grievance, that the Arbitrator order the County to grant union leave after reasonable assessment of departmental needs shows that operations would not be impaired by such leave, and further order the County to immediately reveal to any Union member or officer requesting leave the actual reason for such refusal to allow opportunity for the Union member or officer to appropriately respond to the denial in a timely manner.

The County:

The County contends that it could not grant Handl's request due to the operational needs of the Highway Department, and the Union has failed to demonstrate that management's decision was unreasonable. The County had more than 50 miles of roads that required center striping. The County's concern was for the safety of drivers, as the center strip is essential in guiding drivers, especially at night or in foggy conditions. The County was receiving complaints from towns and the postmaster about the lack of center striping.

When Braunel contacted the operator of the Fond du Lac striping equipment and learned that the operator would come to Manitowoc on September 16th, no option was mentioned of scheduling the machine for September 17th. Braunel knew if he did not schedule the machine for the 16th, he might not see it again for three to five weeks. Such a delay would have been unacceptable for safety reasons. Handl is the only driver of the center striping machine who has the necessary experience and skill to operate that machine correctly. Management never trained anyone else to drive the machine (such as Heran) and had no knowledge that anyone other than Handl operated the machine.

The County argues that it was within its management's rights to deny Handl leave when such leave would have impaired its operations and the safety of people using the highways. Both Braunel and Schramm testified that the only basis for the denial of leave was the center striping work and there was no

connection to an earlier grievance or union activity. Other employees were denied time off during September. With this lone exception, Handl has been granted time off for union business on all other occasions, including up to 11 and a half days in 1989, 27 days in 1990, and 18 days in 1991. The labor contract allows the County to assess not only the number of employees who may be off, but also to evaluate the need for the skills and abilities of those requesting time off.

DISCUSSION:

This is a straightforward case that turns on its facts, and one fact alone stands out in this dispute -- that on September 6, the date the County denied Handl Union leave time, the County had no knowledge of when the striping equipment would be available. Giving the County the benefit of the doubt and assuming that it did not know that Heran had been doing some of the striping work and also assuming that Braunel and/or Schramm told Handl that he was needed to be available for the striping work when denying his request for union leave, there is still one troubling fact -- the County was uncertain when the Fond du Lac operator would be back to work on the Manitowoc roads. In fact, the County had been waiting for the striping equipment since early August, and even given the urgency to get the work done, there is no evidence to warrant a conclusion that the equipment was going to be in Manitowoc County on September 16.

Thus, when the County denied the leave time to Handl, it had no reasonable basis to do so. The County had no reason to believe that its operations would be impaired by Handl's absence, and accordingly, no reason to deny the leave under the terms of the labor contract.

If the County had come to Handl after September 12th, when it learned that the equipment was coming on the 16th, and asked for a change in plans due to those circumstances, it may have had a reasonable basis to deny the leave time. However, the County is using facts it gained after the denial to bolster its position that its denial of leave was in fact reasonable, when at the time of the denial, it had no such facts in hand.

Therefore, the County violated Article 24, Section C, of the collective bargaining agreement by refusing to grant Union leave to Handl.

What is the appropriate remedy? The parties have no ongoing history of denial of requests for leave, and there is no pattern of abuse of this contract section. The fact that Handl cannot be awarded the day off retroactively does not mean that the Union should be left without a remedy where it has demonstrated a contract violation. The Union asks, in essence, that the County be ordered to assess its needs before denying such requests for leave and to reveal to the Union member or officer the reason for its denial of leave time. This is a reasonable request and will be granted.

AWARD

The grievance is sustained.

The Employer violated the collective bargaining agreement by refusing to grant union leave to Charles "Skip" Handl for the date of September 16, 1991.

The Employer is ordered, upon receipt of a request for union leave under Article 24, to make a reasonable assessment of its needs in order to determine whether or not the granting of such leave would impair its

operations, and where it finds such leave would indeed impair its operations, to fully advise the employee requesting such leave of the reasons for denial of leave as quickly as possible after receipt of the request.

Dated at Madison, Wisconsin this 19th day of June, 1992.

By _____
Karen J. Mawhinney, Arbitrator