

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MARINETTE COUNTY (HIGHWAY
DEPARTMENT)

and

MARINETTE COUNTY HIGHWAY EMPLOYEES
LOCAL 300, INTERNATIONAL UNION OF
OPERATING ENGINEERS

Case 145
No. 51413
MA-8599

Appearances:

Mr. Robert L. Calkins, International Representative, International Union of Operating Engineers, P.O. Box 102, Oak Creek, WI 53154-0102, on behalf of Local 300.

Mr. Chester Stauffacher, Corporation Counsel, Marinette County, 1926 Hall Avenue, P.O. Box 320, Marinette, WI 54143-0320, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1994 collective bargaining agreement between Marinette County (Highway Department) (hereafter County) and Marinette County Highway Employees, Local 300, International Union of Operating Engineers (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate an impartial arbitrator to resolve a dispute between them involving whether the County had just cause to issue Ted Rogalski a written warning on January 13, 1994, for his alleged failure to refuel County vehicles. The Commission appointed Sharon A. Gallagher. A hearing was held at Marinette, Wisconsin on December 5, 1994. No stenographic transcript of the proceedings was taken. By agreement, the parties submitted their post-hearing briefs by January 16, 1995. The record was then closed.

Issues:

The parties stipulated that the following issues should be determined in this case:

Did the County violate Article 1.02 and Article 10.03 of the collective bargaining agreement when it issued Ted Rogalski a written warning for failure to refuel County Highway vehicles on January 13, 1994? If not, what is the appropriate remedy?

Relevant Contract Provisions:

ARTICLE 1

Recognition and Management Rights

. . .

1.02 Management Rights. The Employer possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this agreement and the employees' right of adjusting grievances or differences as hereinafter stated, and applicable law. These rights include, but are not limited to the following:

- A) To direct all operations of the County; to maintain the efficiency of County operations; to determine the table of organization; to establish and enforce reasonable uniform work rules, conduct, safety and schedules of work;

. . .

- C) To uniformly enforce reasonable minimum standards of performance; to establish procedures and controls for the performance of work; to hire, promote, transfer, assign or retain Employees (subject to existing practices and terms of this agreement related thereto); to suspend, discharge, or take other appropriate disciplinary action against the Employees for just cause; to lay-off Employees in the event of lack of work or funds;
- D) To introduce new or improved methods or facilities; or to change existing methods or facilities; to terminate or modify existing positions, operations or work practices, giving due regard to the obligations imposed by this agreement, and to consolidate existing positions, departments or operations;
- E) To determine the kinds and amounts of services to be performed as pertains to County operations, and the number and kinds of classifications to perform such services.

...

Article 10

Grievance Procedure and Disciplinary Procedure

...

10.03 Discipline. The purpose of discipline is to correct job behavior and performance problems of Employees. Disciplinary rules and regulations shall be applied in equitable and consistent manner, commensurate with the Employee action. No Employee shall be disciplined, suspended, or discharged except for just cause. Whenever an Employee commits an offense warranting disciplinary action, the Highway Commissioner, the supervisor or designee may take such action as deemed appropriate to the seriousness of the offense committed, though in general, the concept of progressive discipline shall be followed by management.

...

B) Disciplinary Progression. The progression of disciplinary action will be:

- 1) Written reprimand.
- 2) Suspension, not to exceed five (5) working days.
- 3) Dismissal.

An Employee shall not be subject to disciplinary suspension, unless he had been given a written reprimand on a prior occasion, and no Employee shall be subject to discharge from employment unless for cause. The employee shall have the right to have any matter under this paragraph arbitrated as set forth in Section A. Any disciplinary action taken by the Employer against an individual Employee shall be reduced to writing, stating therein the reason for the disciplinary action. The individual Employee and the Union shall be given copies of the said writing and a copy shall be placed in the Employee's personnel file. All disciplinary action taken under this paragraph shall be removed from the individual Employee's personnel file after passage of two (2) years.

Background:

There was a Spring safety meeting conducted by the Highway Department at the Crivitz Town Hall at some time during the years 1988, 1989 or 1990. All Highway Department employees were expected to be present at this meeting. Grievant Ted Rogalski stated that he was present at the meeting. The meeting had been called by then-newly appointed Highway Commissioner Delorit. The subject of refueling vehicles came up due to a question asked by Patrol Superintendent Swanson. Delorit stated that employees would be expected to refuel all trucks and equipment at the end of each work day before their quitting time. At this meeting, Delorit did not state that failure to refuel would result in discipline. 1/

Superintendent Swanson testified that he does not check fuel tanks or fuel levels at all. Swanson stated that he simply watches employees when they return to the shop from their normal work sites at the end of each day to determine whether they are refueling or not. Swanson also stated that Rogalski's written warning of January 13, 1994 was the first time that any Highway Department employe was issued a written reprimand for failure to refuel a County vehicle. Swanson further stated that there has always been a conflict in policies from one Highway Commissioner to another regarding the need to refuel vehicles. Indeed, according to Swanson, the Highway Commissioner who served before Commissioner Delorit frowned upon employees refueling on overtime at the end of their work day. Finally, the County stipulated that it has not written down the "policy" requiring employees to refuel their equipment before the end of their work day.

Facts:

On January 3, 1994, Foreman Steve Porfilio orally warned Ted Rogalski to refuel his truck before he left work. Rogalski responded that he would refuel at the end of the day from then on. 2/ On January 13, 1994, Porfilio heard from a County employe that Rogalski had failed to fuel up at the end of the prior work day. Porfilio confronted Rogalski on this point after he checked Rogalski's gas tank with a dip stick. As a result, Rogalski received the following letter dated January 13, 1994:

. . .

On January 13, 1994, Mr. Steve Porfilio, Superintendent of the Crivitz Shop, informed me of your failure to refuel the County truck you had operated, at the end of each work day.

-
- 1/ Rogalski stated that he did not recall that Delorit made any statement regarding refueling at the Spring safety meeting.
 - 2/ Rogalski admitted that this conversation occurred and corroborated it.

Please be informed that through past practice, all trucks must be refueled at the end of each day.

. . .

Porfilio stated that he had used a dip stick to test the level of fuel in Rogalski's approximately 100 gallon saddle gas tanks before the written warning was issued. Porfilio stated that he found that Rogalski's tank was only three quarters full, or seven to eight inches below the topping off level that the Department expects. Porfilio admitted that he did not check the gas gauge on Rogalski's truck before the written warning was issued.

Rogalski, a twenty-five and one-half year veteran of the Highway Department who works as a Heavy Equipment Operator out of the Crivitz shop, stated that he believed that something was wrong with his gas gauge on or before January 13, 1994 and that he told Supervisor Porfilio about the problem. Rogalski stated that after Porfilio spoke to him on January 3, 1994, he consistently topped off his tank at the end of each work day. Rogalski stated that he felt that he was being picked on and that the imposition of a written warning to him was inconsistent with the County's normal operating procedures.

The only other employe who has ever received a written warning for failure to top off his gas tank at the end of a work day is employe Ronald Netzel, who received a written warning therefor on February 16, 1994 (after the written warning was issued to Rogalski). Netzel stated at the instant hearing that he personally informed Supervisor Porfilio that he had failed to top off his gas tank the night before (February 10, 1994). Netzel stated that he did this because he was afraid that another County employe would report him. Porfilio gave Netzel a verbal warning only. Thereafter, on February 15, 1994, Netzel spoke to Highway Commissioner Delorit and stated that he had failed to refuel his vehicle on February 10, 1994. Commissioner Delorit, on February 16, 1994, issued Netzel the following written warning:

. . .

On February 15, 1994 you personally informed me that you had failed to refuel County Highway vehicle number 108, in which you operate each day.

failure to refuel occurred on February 10, 1994. Please be informed, through past practice, all heavy trucks must be refueled at the end of each business day.

. . .

Union President Steve Berman stated at the instant hearing that he had been previously told to use "good judgment" regarding refueling, prior to the tenure of Commissioner Delorit. In addition, Berman stated that on November 28, 1994, he put 58 gallons of fuel in a County vehicle at 5:00 a.m., which Berman stated he had not used the night before. Berman also stated that the

truck in question had not been at the repair shop the night before he used it. Berman stated that other trucks have not been fully refueled when he has been assigned to use them from time to time. Berman stated that the Union gets all warning notices and that the January 13, 1993 warning notice to Rogalski was the first such warning notice he received in his nine years as Union President regarding the failure to refuel.

Several employes testified regarding the alleged inconsistency on the part of the County in enforcing its refueling policy. Raymond "Mike" King stated that he has not filled up County vehicles on many occasions and that he has never received a warning. In fact, King stated that his supervisor has never checked his vehicles for refueling purposes. King stated that he had to refuel three different vehicles in one day at the Pembine shop because they were too low in fuel to be used. In addition, employe Roger Runnoe stated that he believes in refueling vehicles at the end of a shift, but that recently, perhaps six or seven times, he had to refuel trucks at the start of his shift which were not regularly assigned to him. Runnoe further stated that he had used a Cruise-Air truck which ran out of fuel during his use of the truck and had to be refueled at the job site. Finally, Patrol Superintendent Swanson stated that there is no rule that requires County mechanics to refuel vehicles after they have rendered repairs.

Positions of the Parties:

County:

The County asserted that an unwritten work rule has existed since at least 1988 that employes should refuel all County trucks at the end of each work day. The County observed that grievant Ted Rogalski admitted that he was aware of this refueling rule/policy, although he could not recall it being announced or explained to employes by management at the Spring safety meeting which occurred sometime during 1988 or thereafter. The County further pointed out that at the instant hearing Rogalski admitted that he failed to refuel his truck at the end of the work day on January 13, 1994. The County urged that the Union's evidence that the County had been inconsistent in applying and enforcing the refueling rule/policy, lacked specificity and that the Union had failed to submit a study or statistics regarding non-uniformity of enforcement of the refueling policy to support its case.

The County further asserted that the written warning given to employe Ron Netzel for his failure to refuel his truck in February, 1994, demonstrated that the County has enforced its refueling policy. The County observed that if one accepted the Union's arguments in this case, the Employer could not enforce its rules unless it was able to catch every employe who violated them. Yet the County noted, the Union claimed to be seeking full enforcement of County policies in this case. Thus, the County sought denial and dismissal of the grievance in its entirety.

Union:

The Union observed that the County has no written work rules. Even assuming a County policy directing employes to refuel their trucks at the end of each work day existed, the Union argued that it was discriminatorily enforced against grievant Rogalski who was issued a written reprimand for failure to refuel his truck at least one day after the alleged misconduct occurred. The Union noted that Union President Berman and employes Runnoe and King stated that from time to time they had picked up trucks at the start of a work day which had not been refueled the night before and/or that they had failed to refuel their own trucks at the end of a work day without receiving a warning, even though in some cases they had brought these failures to refuel to the attention of management. The Union asserted that because the County has a written record of the dates upon which each truck is refueled and the number of gallons of the refueling, its discipline of Rogalski (the only employe who had ever been warned for failure to refuel as of January 13, 1994) was both arbitrary and discriminatory. Also, as Rogalski had experienced trouble with his gas gauge, it was unfair for Rogalski's supervisor to test Rogalski's gas tank by using a dip stick. The Union noted that Rogalski had informed his supervisor that his gas gauge was not functioning properly. The facts surrounding the Netzel written warning for failure to refuel his vehicle after Rogalski had received his written warning, in the Union's view, merely support a conclusion that the County has been lax, arbitrary and inconsistent in enforcing its alleged refueling policy.

The Union therefore sought an award sustaining the grievance and ordering the County to expunge the written warning of January 13, 1994 from its records.

Discussion:

The facts of this case demonstrate that the County lacked just cause to issue discipline to Ted Rogalski for failure to refuel his truck on or about January 13, 1994. I note that the record evidence demonstrated the following facts:

1. No other employe had ever received a written warning for failure to refuel a truck prior to January 13, 1994.
- 2) County supervisors have been lax and inconsistent in enforcing the refueling rule.
- 3) According to Union President Berman, employes King, Runnoe and Rogalski, prior to January 13, 1994, the County has been aware that many employes have failed to refuel their trucks before the end of the work day due to the fact that the trucks have needed to be refueled at the start of the next work day or on the job site.
- 4) There is no County policy or rule requiring County mechanics to refuel trucks after they have worked on them

and returned them to the shop.

- 5) County Highway Commissioners and County Supervisors have had conflicting rules and policies. No specific rule or policy has ever been written and published on the subject of refueling.
- 6) Supervisor Porfilio failed to check employe Netzel's truck for fuel on or after the day Netzel admittedly failed to refuel, yet Porfilio used a dip stick to check Rogalski's gas tanks on or about January 12, 1994.

However, the fact that the County may have been lax or inconsistent in enforcing its refueling policy, does not affect Rogalski's case. This is true because Supervisor Porfilio clearly warned Rogalski on January 3, 1994 to refuel his vehicle at the end of each work day. Thus, Rogalski was personally on notice that he should refuel his vehicle at the end of every work day.

The reason that the discipline cannot stand in this case is due to the fact that the County failed to present sufficient evidence to demonstrate that Rogalski had, in fact, failed to properly refuel his truck prior to the County's issuing the written warning of January 13th. In this regard, I note that the County failed to investigate Rogalski's claim that his gas gauge was malfunctioning on or about January 13, 1994. The County also failed to prove how Porfilio's use of a dip stick to check Rogalski's tanks on January 13th was an accurate method of showing that Rogalski had failed to refuel or that the tanks were not full. Given Rogalski's unimpeached testimony that he refueled his vehicle at the end of each work day after Porfilio warned him to do so on January 3, 1994, I issue the following

AWARD

The County violated Article 1.02 and Article 10.03 of the collective bargaining agreement when it issued Ted Rogalski a written warning for failure to refuel County highway vehicles on January 13, 1994.

The County shall, therefore, immediately expunge from its records and Rogalski's personnel file the written warning dated January 13, 1994, and all references thereto.

Dated at Oshkosh, Wisconsin this 23rd day of February, 1995.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator