

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ONEIDA COUNTY (HIGHWAY DEPARTMENT)

and

ONEIDA COUNTY HIGHWAY EMPLOYEES
LOCAL UNION NO. 79, AFSCME, AFL-CIO

Case 104
No. 51832
MA-8751

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lindwood Lane, Green Bay, Wisconsin 54311, on behalf of Local 79.

Mr. John L. O'Brien, Drager, O'Brien, Anderson, Burgy and Garbowicz, Arbutus Court, Box 639, Eagle River, Wisconsin 54521, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1993-1995 collective bargaining agreement between Oneida County Board of Supervisors (hereafter County) and Oneida County Highway Employees Local Union No. 79, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding the assignment of finished paving work at overtime pay to Steve Schramke on July 1, 1994. The Commission appointed Sharon A. Gallagher to hear and resolve the dispute between the parties. At the hearing, the parties waived their right to have an Arbitration Board hear and decide the dispute, pursuant to Article 6, Section F of the labor agreement. A hearing was held at Rhinelander, Wisconsin on February 7, 1995. No stenographic transcript of the proceedings was made. The parties filed reply briefs by April 7, 1995. The parties' briefs were received and exchanged by the undersigned. The record was closed on April 7, 1995.

Issues:

The parties were unable to stipulate to the issue or issues to be decided in this case. However, the parties stipulated that the arbitrator could frame the issues based upon the relevant evidence and argument in the case. Therefore, the Union suggested the following issues for resolution:

Did the County violate the parties' working agreement when it

failed to offer scheduled overtime to senior employees?

If so, what is the appropriate remedy?

The County suggested the following issues for resolution in this case:

Did the County comply with Article 7B of the labor agreement when it assigned finish grading work to the employe who, in the judgment of the Highway Commissioner, was well qualified to perform the work?

If not, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case and the relative vagueness of the Union's stated issues, the undersigned concludes that the County's suggested issues should be determined in this case.

Relevant Contract Provisions:

Article 6 - Grievance Procedure

. . .

Section F: The County and the Union shall each select one member of the arbitration board and the two members selected by the parties shall use their best efforts to select a mutually agreeable chairman of the arbitration board. If the two selected persons are unable to agree on the chairman within thirty (30) days, either party may request the Wisconsin Employment Relations Commission to appoint the third arbitrator. The parties hereto may mutually agree to waive the panel and proceed directly to the Commission for an arbitrator.

. . .

Article 7 - Call-Time

. . .

Section B: Overtime work shall be called for or assigned by seniority to employees who, in the judgment of the Highway Commissioner or direct supervisor, are well qualified to perform the

available overtime work and who are not working on a regularly scheduled job. Employees may challenge the judgment of the Commissioner or direct supervisor as provided for in Article 14, Section I. This shall not apply to employees working on a project at the end of the normal work day who are required to complete the work inclusive of overtime or to patrolman or patrolman's helpers who are assigned to a specific section or beat on a year-round or seasonal basis, inclusive of overtime work in their section or beat. All full-time employees shall be either on the job or not available before any part-time, temporary or seasonal employees are called or assigned. However, student employees may be used for flagging on construction projects regardless of seniority or overtime.

. . .

Article 14 - Vested Rights of Management

Section A: The right to employ, to promote, to transfer, to discipline and discharge employees and to establish work rules is reserved by and vested exclusively in the Oneida County Board through its duly elected Highway Committee and duly appointed Highway Commissioner. The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure.

Section B: The management of the property and equipment of the Oneida County Highway Department is reserved by and vested exclusively in the Oneida County Board through its duly elected Highway Committee and duly appointed Highway Commissioner.

. . .

Section I: Any employee who feels that he/she has been wrongfully or unjustly treated according to the provisions of this agreement may appeal through the grievance procedure of this agreement.

Facts:

During the summer of 1994, the Highway Department was operating on a regular work week of four ten hour days, Monday through Thursday. On Friday, July 1, 1994, a number of

employees were assigned to work scheduled overtime. On that date, Steve Schramke was assigned to work operating a cat grader doing finish grading work on County Highway Y and Steve Scubal was assigned to work operating a dozer pushing gravel to a crusher. These assignments were made by the Highway Commissioner, Robert H. Maass. As Highway Commissioner Maass stated, finish grading requires special skills and safety procedures which other equipment operation duties do not. Commissioner Maass stated that in his opinion, employe Doug Cook (first on the seniority list), lead man Denny Stern (second on the seniority list), Jim Hamilton (fourth on the seniority list) and Steve Scubal (seventh on the seniority list) are well qualified to perform finish grading work for the Department.

Commissioner Maass stated that he offered Jim Cook the finish grading work on County Highway Y to be done on July 1, 1994. Cook turned the work down. Lead man Stern was on vacation on July 1, 1994 as was the employe third in seniority, Dave Richardson, and Jim Hamilton was also on vacation on July 1, 1994. Jim Bonack (fifth on the seniority list) does not normally operate equipment for the Department and would not have been considered for the finish grading work to be done on July 1. In addition, stockroom clerk Stanley Pecor (sixth on the seniority list) has not operated finish grading equipment and also would not have been considered for the finish grading work to be done on July 1st. On July 1, 1994 Steve Scubal (seventh on the seniority list) had already been assigned to work on the push dozer on Highway Q. On July 1, 1994 the landfill worker, Lance Johns (eighth on the seniority list) was working at the landfill and unavailable to do any other work that day.

The record showed that the following employes were not asked to perform the finish grading work available on July 1st:

Darrel Juedes (9th on the seniority list)
Tom Collier (10th on the seniority list)
Russ Klaphingst (11th on the seniority list)
Kirk Miller (13th on the seniority list)
Pat Hall (14th on the seniority list)
Guss Bramann (16th on the seniority list)
Dave McCarty (18th on the seniority list)
Bobby Cocker (21st on the seniority list)
Butch Black (22nd on the seniority list)

The employes above Steve Schramke (23rd on the seniority list), not listed above, were either unavailable for work on July 1, 1994 or they were incapable of performing finish grading duties. 1/

1/ The Union contended that only the above-listed employes were well qualified to perform finish grading and the County resisted this contention.

Steve Schramke stated that for the past four years of the eight years he has worked for the County he has been performing finish grading duties. Schramke stated that when he began working out of the Monico Shop for the County, another Highway Department employe who worked out of that shop showed him how to use the grader and he thereafter maintained the town roads using the grader. On July 1, 1994, Schramke operated the finish grader behind the milling machine which was chopping up the asphalt road ahead of him. Schramke used the asphalt material to smooth out and shape the road with the finish grader.

Commissioner Maass stated that he sought the insertion of the "well qualified" language into Article VII, B when he came on board as Highway Commissioner approximately twelve to thirteen years ago. Maass also noted that there is no requirement in the contract that employes be trained on any sorts of equipment. Maass stated that finish grading work is different from grading with gravel on town roads to fill in low spots. Maass stated that none of the following senior employes was qualified to perform the finish grading work available on July 14, although some of these employes have used a grader to perform other types of grading: Juedes, Collier, Hall, Bramen, McCarty, Cocker and Black. Maass stated that he did not have one employe between Jim Hamilton (5th on the seniority list) and Steve Schramke (23rd on the seniority list) who could properly perform finish grading work.

Steve Scubal stated that he did not believe there had been an instance of cross-bumping in the past 12 to 13 years. Employes Fox, Juedes and Schramke could not describe specific details of instances when cross-bumping had been allowed by the County, although they asserted such cross-bumping had occurred.

Positions of the Parties:

Union:

The Union urged that the scheduling of Steve Schramke for overtime work on July 1, 1994, violated Article 7, Section B of the collective bargaining agreement. The Union urged that there was at least one qualified employe with greater seniority than Schramke who was available on July 1 for the finish grading work involved. The Union argued that Article 7, Section B did not require the most qualified person to be selected to perform the work, only a well qualified person. The Union noted that Steve Scubal (the 7th in seniority) was certainly well qualified to perform the finish grading work available on July 1, 1994 and that Darrell Juedes (the 9th most senior employe) should have been assigned to do the push dozer work that Scubal performed on July 1, 1994.

Thus, the Union asserted that in this instance, the County should have done as it has done in other instances, allowed cross-bumping, where a more senior employe bumps a less senior employe and then the less senior employe bumps another employe. Although the Union noted that

the contract does not specifically require management to shift people around to accommodate senior employees' working desires, cross-bumping has occurred on a regular basis. Since the overtime work in question was planned in advance, the Union noted, the County could have easily arranged the work schedule to ensure that the most senior employees available were assigned to do the work.

The Union observed that in various Articles of the collective bargaining agreement, for example Articles 4, 5, 9, and 15 (relating to seniority, promotions, vacations and job classifications and rates of pay), the parties have recognized the importance of seniority in their relationship. Thus, from the Union's point of view, the County is simply attempting to destroy the seniority rights previously negotiated and spelled out in the collective bargaining agreement by giving preferential treatment to certain employees. The Union observed that Steve Schramke stated at the hearing that he had obtained experience operating various pieces of heavy equipment prior to his employment with Oneida County and that he had learned to operate a Cat Grader through on-the-job training in the Monico shop while he was employed with the County. However, the Union expressed dissatisfaction with the haphazard manner in which the County appeared to be willing to offer such on-the-job training to senior employees.

In conclusion, the Union urged that Steve Schramke (23rd on the seniority list) should not have been assigned to perform finish grading work on July 1, 1994 and that his assignment to perform this work, violated Article 7, Section B of the collective bargaining agreement. The Union therefore asked the Arbitrator to sustain the grievance and order the County to abide by the language of Article 7, Section B, and assign overtime work to senior employees qualified to perform that work in the future.

County:

The County observed that Highway Commissioner Maass testified that in his opinion there were only a limited number of department employees who were qualified to perform some grading duties: Cook, Hamilton, Scubal, Juedes, Collier, Christie and Schramke. However, on July 1, 1994, the most senior employe who was well qualified to perform finish grading duties was Steve Schramke, according to the Highway Commissioner. The County observed that it is the Highway Commissioner who must make the judgment regarding which employees are "well qualified" to perform available overtime work. The County urged that if the Union prevails in this grievance the result will be that the Highway Commissioner will lose the contractual discretion under Article 7, Section B, to judge the skills of employees and that that section of the contract will be rendered meaningless.

A secondary issue, not specifically raised by the grievance herein, was the question whether cross-bumping must be allowed in order to assign more senior employees to certain pieces

of equipment and allow less senior employees to bump into other positions if displaced. The County urged that the overwhelming testimony of the Union witnesses (Fox, Scubal, Juedes and Schramke) demonstrated that cross-bumping has not occurred. As cross-bumping is not required by the collective bargaining agreement, and was not established by any evidence of practice, the County asserted that cross-bumping is a non-issue in this case.

The County submitted that the Union's real grievance, although well hidden in this case, is based on the Union's belief that some employees have been given the opportunity to learn new skills on-the-job while others have not. Whether the Union is correct that job opportunities have not been fairly distributed, is not relevant to this case. As Highway Commissioner Maass had the right to exercise his judgment and assign finish grading work to the employee he felt was well qualified pursuant to Article 7, Section B, the County urged that the grievance must be denied and dismissed in its entirety.

Reply Briefs:

Union:

The Union observed that the County's assertion that Steve Schramke was the most senior employee capable of performing the finish grading work available on July 1, 1994, was contradicted by Highway Commissioner Maass. Maass stated that three more senior employees, Scubal, Juedes and Collier were capable of performing finish grading and they were available for work on July 1st. The Union urged that the contract clearly states that it can challenge the judgment of the Highway Commissioner by filing a grievance regarding Article 7, Section B, assignments. The Union contended that cross-bumping and on-the-job training were "red herring" issues raised by the County. In reality, the Union asserted, the real issue in this case is whether the Highway Commissioner can select a well qualified employee to perform work without considering seniority. The Union emphatically urged that the Highway Commissioner may not do this -- that he must select the most senior well qualified employee. The Union therefore urged that the grievance must be sustained.

County:

The County urged that Article 7, Section B does not require it to decide which employee was most qualified for the finish grading work available on July 1, 1994. Rather, that Section clearly states that the County may select a "well qualified" employee. The County contended that the Union failed to prove that senior well qualified employees were available and willing to perform the three specific jobs available on July 1st. The County asserted, in addition that the kind of cross-bumping the Union ultimately argued for in this case is not required by the labor agreement.

The County observed that the Union also failed to prove a past practice of cross-bumping. Two alleged incidents of senior employees exercising their bumping rights were insufficient to

prove a past practice in the County's view. Indeed, the Union failed to prove that any employe wished to bump Scubal or made any effort to do so. Therefore, the County urged that the grievance be denied and dismissed.

Discussion:

Article 7, Section B, states that overtime work "shall be assigned by seniority" to employes who "are well qualified" in the judgment of the Highway Commissioner. This language, in my view, clearly states that the Highway Commissioner has the discretion to judge the qualifications of employes available to perform overtime work. The Union has placed special emphasis on the use of the word "seniority" in the first part of Section B. The Union is correct that the assignment of overtime must be done by seniority under the contract. However, this fact does not diminish the Highway Commissioner's right to make sure that the employe selected for overtime work is well qualified therefor (emphasis supplied). I note that the Union is also correct that the language of Section B does not require the Highway Commissioner to select the most qualified employe, just an employe who is well qualified.

The Union's argument that the Commissioner must move employes around on jobs so that well qualified senior employes remain employed for overtime is not supported either by the language of the labor agreement or by the record evidence of past practice. In this regard, I note no provision is contained in the labor agreement requiring that more senior employes be allowed to bump less senior employes in such circumstances. In addition, the Union failed to prove that a long-established mutually accepted past practice exists to require the County to allow cross-bumping or to require it to move employes around on jobs so that the most senior employes are assigned to work all overtime.

In all the circumstances of this case and given the lack of evidence to show that Commissioner Maass' uncontroverted testimony was incorrect that, in the Commissioner's opinion, not one employe between Hamilton and Schramke was "well qualified" to perform the finish grading work available on July 1, 1994, I issue the following

AWARD

The County complied with Article 7B of the labor agreement when it assigned finish grading work to the employe who, in the judgment of the Highway Commissioner, was well qualified to perform the work.

The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 5th day of June, 1995.

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