

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GENERAL TEAMSTERS UNION, LOCAL NO. 346

and

DOUGLAS COUNTY (HIGHWAY DEPARTMENT)

Case 211
No. 51719
MA-8717

Appearances:

Mr. Steven D. Ansell, Vice President, General Teamsters Union, Local No. 346, on behalf of the Union.

Mr. John Mulder, Personnel Director, Douglas County, on behalf of the County.

ARBITRATION AWARD

General Teamsters Union, Local No. 346, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Douglas County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate the dispute. A hearing was held before the undersigned May 24, 1995, in Superior, Wisconsin. There was no stenographic transcript made of the hearing and the parties made oral argument. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there were no procedural issues, and to the following substantive issue:

What is the appropriate rate of pay for all hours worked in the absence of the Patrol Superintendent from January 1, 1994 to April 9, 1995?

CONTRACT PROVISIONS

The following provisions of the parties' 1994-1995 Collective Bargaining Agreement are cited:

ARTICLE 37.

Section 1. EFFECTIVE DATE: The effective date of this Agreement will be January 1, 1994, to and including December 31, 1995.

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Appendix A

DOUGLAS COUNTY HIGHWAY DEPARTMENT
WAGE RATES
January 1, 1994

1/1/94 1/1/95

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Interim Patrol Supt.	13.32	13.65
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BACKGROUND

The grievant, Dick Hurst, has been an employe of the Douglas County Highway Department for approximately thirty-three years and since 1984 has held the position of Assistant Patrol Superintendent/Foreman. Since that time Hurst received the Patrol Superintendent's hourly rate of pay whenever the latter was absent. When the Patrol Superintendent is not absent, Hurst receives the Outdoor Foreman pay rate listed in the parties' labor agreement.

The Patrol Superintendent position is considered a supervisory position by the County and is not in the bargaining unit. Effective January 1, 1994, the County made the Patrol Superintendent position exempt under the Fair Labor Standards Act (FLSA) resulting in that position no longer being entitled to overtime pay under the FLSA; however, the County increased the pay rate for the position. At the same time the County proposed a new pay classification of "Interim Patrol Superintendent" and for some time proposed a pay rate

equivalent to the Patrol Superintendent's old rate of \$13.07 per hour. Negotiations on a successor labor agreement to the expired 1993 Agreement continued and ultimately proceeded to interest arbitration.

In May of 1994, the Patrol Superintendent was absent and Hurst filled in for him. Hurst was paid the old pay rate for Patrol Superintendent for those hours and subsequently grieved the fact that he was not paid the then present rate for Patrol Superintendent for those hours when the Patrol Superintendent was absent.

The parties also stipulated to the following facts:

1. On January 1, 1994, the County did increase the rate of pay to \$16.79 per hour for the Patrol Superintendent and changed the position's status to exempt from non-exempt (for the purposes of the Fair Labor Standards Act).
2. The County did pay \$13.07 per hour for the work on the day of the incident giving rise to the grievance.
3. The County should not have paid \$13.07 per hour for that work, but should have awaited the outcome of negotiations on the new contract.
4. There is a rate for "Interim Patrol Superintendent" in the new contract (1994-95) and said contract is retroactive to January 1, 1994.
5. Interim Patrol Superintendent is a new classification.
6. The new contract (1994-95) was signed on April 10, 1995.

The grievance proceeded through the parties' grievance procedure and ultimately was submitted to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union argues that the Agreement is silent on the issue in dispute, and, therefore, past

practice governs. In the past the County has always paid the higher Patrol Superintendent wage rate.

The Union opines that it is immaterial that the parties negotiated a wage rate for a new position of Interim Patrol Superintendent into the new contract, since the new position and wage rate did not become effective until the new agreement was signed. The Union argues that the grievant always received the Patrol Superintendent rate of pay when he worked in that classification, and it is not his "or the Union's fault that the County went ahead and implemented the wage change and raise for the Patrol Superintendent before the new contract was signed into Agreement."

For a remedy, the Union requests that the Arbitrator sustain the grievance, and order the County to pay the grievant all lost wages for the period of January 1, 1994 through April 9, 1995.

County

The County argues past practice was only in affect until the prior agreement expired on December 31, 1993. Although the new agreement took a long time to negotiate, it went into effect retroactive in all items to January 1, 1994, including the new wage rate for Interim Patrol Superintendent. To hold otherwise would allow the Union to benefit from delaying settlement of the agreement during the period of time the County was trying to negotiate the past practice out of the contract.

The County maintains that it has operated within its legal rights by setting a new wage rate for a non-bargaining unit position (Patrol Superintendent) while bargaining the impact of same on the bargaining unit. The result of that bargaining is a new Interim Patrol Superintendent wage rate retroactive to January 1, 1994. The County asserts that the Union should not be allowed to pick and choose what items it wants to be retroactive. The County concludes that it has a signed agreement which covers the time period in question and controls the remedy herein.

The County requests that the grievance be denied and the matter be dismissed.

DISCUSSION

It appears from the record that the longstanding practice was to pay the Assistant Patrol Superintendent/Foreman the Patrol Superintendent's rate when the latter was absent. The County proposed that the parties' new agreement instead include a pay rate for such work under the classification of Interim Patrol Superintendent, with that rate being less than the Patrol Superintendent rate. By its terms, the parties' 1994-1995 agreement was retroactive to January 1, 1994 (Article 37, Section 1). The question then is whether the new agreement, although signed on

April 10, 1995, retroactively supersedes the practice effective January 1, 1994. That question must be answered in the affirmative.

The arbitrator's role (and authority) is limited to the interpretation and application of the provisions of the parties' labor agreement. A past practice is relevant when the parties' agreement is either silent or its terms are ambiguous as to the situation addressed by the practice. The practice is relevant because it evidences the parties' intent as to that situation. In this case the parties have negotiated a successor agreement which, by its express terms, retroactively covers the period in question. In addition, the new agreement contains a stated pay rate for "Interim Patrol Superintendent" to cover those situations when the Patrol Superintendent is absent. As a matter of contract, the past practice ended with the expiration of the parties' 1993 agreement and their new agreement covers the period from January 1, 1994 through December 31, 1995. Thus, the appropriate pay rate when the Patrol Superintendent is absent is that stated in the Agreement.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 23rd day of August, 1995.

By David E. Shaw /s/
David E. Shaw, Arbitrator