

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 105
No. 51833
MA-8752

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 County's failure to assign snow plowing duties to Grievant David McCarty on February 12, 1994. The Commission appointed Sharon A. Gallagher to hear and resolve the dispute between the parties. At the hearing, the parties stipulated that they would waive the use of an Arbitration Board in this case (described in Article 6, Section F of the labor agreement) and that the undersigned would be the sole arbitrator of their dispute. The hearing in this case was held on February 7, 1995. No stenographic transcript of the proceedings was made. The parties filed their initial post hearing briefs with the undersigned by March 13, 1995 and they were thereafter exchanged. The parties reserved the right to file reply briefs. Reply briefs were filed by April 7, 1995 and exchanged by the undersigned, whereupon the record was closed.

Issues:

The parties were unable to stipulate to the issue or issues to be determined in this case. However the parties stipulated that the undersigned could frame the issues based upon the relevant evidence and argument in this case. The Union therefore suggested the following issues to be determined:

Did the County violate the parties' working agreement when it

failed to offer overtime for snow plowing to the Grievant David McCarty?

If so, what is the appropriate remedy?

The County suggested the following issues statement:

Did the County violate the parties' working agreement when it failed to offer overtime for snow plowing to Grievant David McCarty or did the County correctly follow a longstanding policy accepted by both parties in the assignment of overtime?

Based upon the relevant evidence and argument in this case, the undersigned concludes that the Union's issues shall be determined herein.

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.

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Article 7 - Call-Time

Section A: All employees shall receive two (2) hours call pay, at the rate of straight time in addition to the actual number of hours worked, when said employees are called to report for work outside the regular specified hours as defined under Article 16 of this Agreement. If the employee is notified to report for pending work, prior to the end of the work day, no call pay will be allowed.

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.

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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.

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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:

Oneida County maintains the highways within its boundaries by assigning "beats" to Highway Department employes who then work on these beats regularly out of the County's four "shops": Rhinelander (the main shop), Three Lakes, Minocqua and Monico. The State road beats (ten beats) are separate from the County road beats (seven beats). The majority of the beats originate out of the Rhinelander shop, which cover most of State Highway 47, North, County Highway K, West, County Highway C, East, State Highway 17, North, State Highway 45, South, State Highway 8, East and West, County Highway G, Q and N, South, County Highway D, H and A, North. Grievant David McCarty is assigned to the Monico shop and his County beat originates out of that shop, covering parts of County Highways Q, B, M and Z in and around the Pelican Lake area.

On February 12, 1994, Dennis Stern, Highway Department Leadman and Patrolman, had been designated Acting Superintendent. At approximately 8:30 a.m. on February 12, 1994, Stern received a call from the Sheriff's Department indicating that road conditions were poor due to a snow storm. Shortly thereafter, Stern began calling Highway Department employes and offering them overtime to remove snow from the State highways. Stern stated that he decided not to call in County beat employes because many of the County beat employes were unavailable due to a social activity that they were engaging in (a snow mobile ride that day). Stern stated that he found this out when he began calling in County employes on February 12th. Jerry Alsteens and Steve Schramke were among the employes that Stern called in and who reported to perform overtime snow plowing on February 12th. Alsteens is a Mechanic employe for the County and Schramke is an Equipment Operator I. Both employes work out of the Rhinelander shop but neither is assigned to either a State or County beat. David McCarty has less seniority than Alsteens but more seniority than Schramke. On February 12, 1994, Stern did not call and offer overtime snow plowing work to McCarty.

At approximately 11:30 on that day, McCarty called the Rhinelander shop and spoke with Stern. McCarty asked if he was going to be called in for snow plowing duties that day. Stern replied that he was only calling in State beat employes but that McCarty should report to work at 2:00 a.m. on Sunday, February 13, 1994, to plow his assigned County beat out of the Monico shop. McCarty responded that in this event, he would be going fishing on February 12th.

Leadman Stern stated that he has been calling in employes for the past three to five years when the Superintendent is on vacation or on sick leave. Stern stated that he regularly follows the following procedure in assigning overtime work in snow plowing situations: he assigns the snow plowing to the employe whose beat needs to be plowed; he then goes down the seniority list and calls employes by seniority. Stern also stated that he is influenced by the shop in which the employe normally works, that he generally calls State beat employes first and then calls County

beat employes for overtime but that he generally goes by seniority. Stern made it clear that Mechanics are the last employes to be called out after he (Stern) has exhausted all employes on the seniority list. Stern stated that he does not use County-wide seniority and stated on cross-examination that whether the beat to be plowed is a State beat or a County beat is not important to him but that seniority in the shop controls if he is unable to assign the plowing of the beat to the employe who regularly plows that beat.

Stern stated that Dave McCarty is the only employe who works out of the Monico shop, that there is one employe who works out of the Three Lakes shop, five who work out of the Minocqua shop and the remaining bulk of the employes work out of the Rhinelander shop. Stern stated that one State beat is run out of the Three Lakes shop, three State beats are run out of the Minocqua shop but that no State beats are run out of the Monico shop and the remaining State beats are run out of the Rhinelander shop. Stern stated that on February 12th, he went down the entire seniority list out of the Rhinelander shop before he called in Mechanic Alsteens to plow the State beat that was available. Rhinelander shop employe Steve Schramke also worked overtime on February 12th after being called by Stern.

Grievant McCarty timely filed the instant grievance on February 16, 1994, when he became aware that Schramke and Alsteens had worked overtime when he was available for that work and not called. 1/

Events which occurred after the grievance:

Prior to April 13, 1994, the Union and the County met, discussed and agreed upon a call-in procedure for non-emergency situations. The County confirmed the County's agreement in a letter from Personnel Department Director Carey Jackson to then-Union Representative David Ofria, dated April 22, 1994 (Joint Exhibit 4). That letter read in relevant part as follows:

Below is my understanding, based on our meeting of April 13th, regarding work seniority within the Highway Department. If your understanding is the same as mine, please sign the bottom and return a copy to this office.

1. For call-in purposes, except emergencies:
 - A. The individual normally assigned to the "beat", provided they are qualified to do the work, shall be

1/ There was conflicting testimony offered by Leadman Stern and employe Stan Pecor involving a statement Pecor asserted Stern made after problems surfaced regarding Stern's calling in employes for February 12th. Pecor asserted and Stern denied that Stern stated that he had made mistakes calling in employes on February 12th and that Pecor had better keep his mouth shut about it. Because this conflict is not determinative of this case, I see no need to resolve it herein.

called in first.

- B. Shop seniority applies to shops in Monico, Rhinelander, Three Lakes and Minocqua. Whenever there is work in one of the four shops, the most senior employe (provided he/she is qualified to do the work) from the shop where the work is available, shall be called in first. If this person is not available or if there is more work than one person can handle, the next person with shop seniority, provided they are qualified to do the work, shall be called in. This shall continue until the shop seniority list has been exhausted.
- C. When the shop seniority list has been exhausted then Department seniority shall apply. The most senior employe within the Department, including all of the shops, who is qualified to do the work, shall be called in next.
- D. A, B and C above, does not pertain to Mechanics. Mechanics are called-in when A, B and C have been exhausted.

...

- 3. The procedure for contacting employees shall be as follows:
 - A. The employee will be called at a telephone number (1) that the employee shall give to the patrol superintendent. The employee may change this yearly or when their resident telephone number is changed.
 - B. Management shall maintain a call list which shall include, as a minimum, name of the employee called, date and time of the call.
 - C. Senior employees who were called under 3(A), but who were not immediately available for work, shall not have the right to "bump" a less senior employee who was called and assigned to work. A senior

employee may call the Highway Department any time during the assignment period, and shall be assigned to the next available slot provided they are qualified to perform the work associated with that slot.

It is clear from the record that the Local Union voted to ratify the above-quoted language at some time after April 22, 1994. However, the Union never executed the above-quoted "agreement" because Union Representative Ofria left the Union's employ and Union Representative Campshure was hired to replace him. When Campshure came on board, the Local Union asked Campshure to review the formal document which the County had submitted for execution (Joint Exhibit 5B). That document contained changes in part C of the first section regarding the procedure for call-in except in emergencies:

. . .

- C. When the shop seniority list has been exhausted, the work will be assigned by seniority from the Rhinelander shop to the most senior person qualified to do the work. . . .

Paragraphs A, B and D remained the same as in the original document which the Union had ratified. Because the above-quoted change in Section C had been made, Union President Fox stated, the Union refused to accept and execute the amended agreement.

On August 24, 1994, seven months after McCarty filed the instant grievance, Personnel Director Jackson sent a letter to Union President Fox (Joint Exhibit 3A), denying that grievance, which read in relevant part as follows:

. . .

It is the established past practice of the parties that:

1. Employees assigned to a "beat", are called in first, provided they are qualified to do the work. "Beats" are assigned out of particular shops, such as Rhinelander, Minocqua, Three Lakes and Monico. In this case, the beat was out of the Rhinelander shop and the employee assigned to the beat was called in to plow snow.
2. If the employee in #1 above is not available, then the most senior qualified and available employee within that classification shall be called from the shop wherein the beat is located. If the beat originates out of the Rhinelander shop, then the most senior qualified and available snowplow operator out of the Rhinelander shop is called to snowplow

that beat.

3. If there are not available qualified employees from the shop where the beat is located then the most senior qualified and available employee from all the shops, within that classification, shall be called in to plow that beat.

4. Mechanics and the Storeroom person shall be called in only when #1 through #3 have been exhausted.

. . .

Despite the other conflicts in the above-described evidence, it is clear that the parties consistently proposed to call mechanics in last. However, the parties' negotiations never resulted in a call-in procedure agreement.

Position of the Parties:

Union:

The Union urged that the issues in this case hinge upon whether there is a binding past practice applicable to the situation arising on February 12, 1994, such that the Grievant should have been assigned to plow snow that day. The Union observed that the County is essentially attempting to unilaterally broaden the scope of an existing past practice to cover non-emergency situations such as occurred on February 12. In this regard, the Union contended that the County has overstated the practice found by WERC Arbitrator Richard McLaughlin in Case 46, No. 34806, MA-3638 (1/86). There, the Union observed, Arbitrator McLaughlin found that in an emergency (cleaning up after a tornado), the County had a right pursuant to a proven past practice to call in employees from the shop closest to the emergency within a given classification according to seniority.

The Union observed, that under questioning by the Union, Highway Commissioner Maass stated that normal snow storms do not constitute an "emergency", and that the snow storm on February 12, 1994 was a normal snow storm. In addition, the Union asserted that Grievant McCarty, operating out of the Monico shop was the most logical employee to call in to cover State Beat 6 which covers Highway 45 North from Monico, Highway 8 East from Monico and Highway 45-47 South from Monico toward Pelican Lake.

The Union asserted that for many years, there has been a mutually accepted practice that Mechanics in the shops would only be called in for snow plowing as a last resort. The Union pointed out that the various documents by which the parties attempted to codify the practice (Joint Exhibits 3A, 4 and 5A) all indicated that Mechanics would only be called in for snow plowing in

non-emergency situations when all other employees were unavailable. Thus, the Union urged, the Grievant should have been called in to plow snow on February 12th before Mechanic Alsteens. The Union further asserted that the parties had a distinct verbal agreement regarding call-in for overtime in non-emergency situations, as testified to by Union witnesses Fox, Pecor, Hall and McCarty. In this regard, the Union asserted that had there been a contrary practice in existence when Grievant McCarty posted from a Mechanics position into his Operator I position in the Monico shop, the County had an obligation to inform him that his seniority rights would be curtailed at that time.

Finally, the Union asserted that Leadman Dennis Stern's testimony lacked credibility. The Union noted in this regard, that Stern admitted at the instant hearing that he did not keep track of which employees he had called and offered overtime on February 12, 1994, although he claimed that he had called all employees assigned to the Rhinelander shop before calling out Alsteens and Schramke. However the Union noted, Stern clearly did not call either Rhinelander shop employee Clarence Cooper (who filed a call-in grievance and later withdrew it) or Union President Joe Fox to work overtime on February 12th. The Union also observed that Stern's testimony contained internal conflicts regarding his calling procedure on February 12th. Also, the Union asserted that the conflict in testimony between Highway Department employee Stan Pecor and Dennis Stern should cause Stern's testimony to be questioned. The Union noted that Stern admitted that he had made mistakes in calling in for overtime in the past and that he had apologized to Clarence Cooper in settlement of Cooper's grievance regarding Stern's failure to call him in on February 12, 1994 for overtime work.

In sum, the Union asserted that in the absence of any definite evidence demonstrating the existence of a binding past practice as asserted by the County, the Union asserted that the language of Article 7, Section B should be applied so that Grievant McCarty should receive call pay plus five hours' overtime pay for the hours he should have been offered on February 12, 1994.

County:

The County asserted that a longstanding past practice has existed such that the County has regularly assigned overtime by seniority out of the shop where the beat originated. In this case, the assignment was for plowing a State beat which originated out of the Rhinelander shop. The County noted that Grievant McCarty is assigned to work out of the Monico shop. Thus, the County contended, McCarty was not entitled to receive the snow plowing work available on February 12, 1994. The County observed that the sole issue in this case is whether the County violated the contract by assigning the overtime work available on February 12th in the manner in which it did. The County noted that the issue then, is whether the County should have called out Grievant McCarty, not whether it called out the right or wrong employee from the Rhinelander shop to do the work.

In this regard, the County contended that Article 14 of the collective bargaining agreement

which covers the management rights of the County, reserves to the County the right to direct employes among other things. Thus, the County asserted, it had the right to assign overtime by virtue of Article 14 in the absence of any specific contractual language to the contrary. Although, the County observed, the Union may wish to have overtime work assigned in a manner other than the way the County has chosen to do so, the Union should address these needs in the negotiation process and not through the grievance arbitration process.

In sum, the County urged that the grievance be denied and dismissed in its entirety as there was no showing by the Union that the County had violated any provision of the labor contract or that it had violated any established past practice. Indeed, the County asserted, there was ample record evidence to show that the County merely followed a longstanding past practice in assigning the overtime work available on February 12, 1994.

Reply Briefs:

Union:

The Union urged that no agreed-upon call-in procedure existed on February 12, 1994. The Union noted that the McLaughlin Award specifically covers only the call-in practice in emergency situations. No emergency was involved on February 12th. Yet Mechanic Alsteens was called in while McCarty was passed over, contrary to testimony and documents showing that the County's practice has been to call Mechanics in only when all road employes are unavailable. Thus, the Union contended that the County violated the labor agreement in this case and that it should also be ordered to cease using Dennis Stern, a bargaining unit employe, to perform call-in duties.

County:

The County urged that the Union's arguments in this case are confusing. It noted that the Union did not notify the County that its letter of September 29, 1994 with enclosure, failed to contain the "correct" codification of the parties' call-in practice. The County asserted no violation of the County's practice occurred in this case as the County followed its September 29, 1994 document (Joint 5A) by calling in the beat men, then the Rhinelanders men (including Schramke) and finally the Rhinelanders Mechanic (Alsteens).

The County noted that its witnesses confirmed that the correct procedure to be followed was that detailed in the County's September 29th letter. The County urged that in any event, Grievant McCarty was not available to work on February 12 because he called Stern to ask if he would be assigned and when told only the State beats would be plowed, McCarty volunteered that in that case, he would go fishing. The County noted that Union President Fox's testimony regarding past practice stood uncorroborated and it should therefore be disregarded. The County also asserted Leadman Stern's testimony should be credited. The County sought denial and dismissal of the grievance.

Discussion:

This case arose because of the procedure used by Leadman Dennis Stern to call in employes for necessary, non-emergency snow plowing on February 12, 1994. 2/ There is no dispute that Grievant McCarty is well qualified to do snow plowing work.

Article 7, Section B of the labor agreement provides that "overtime work shall be . . . assigned by seniority to employes who, in the judgment of the Highway Commissioner . . . are well qualified. . . ." The labor agreement also provides for challenges to the Highway Commissioner's judgment and indicates certain specific exceptions not relevant here, but the contract does not otherwise lay out the call-in procedure.

In these circumstances, evidence of past practice is relevant and admissable to flesh out the true intent of the parties. The parties submitted evidence regarding the parties' attempts during and after April, 1994, to reach an extra-contractual agreement containing details regarding the proper call-in procedure to be used in non-emergency situations. This evidence is conflicting and not particularly helpful. In addition, these failed settlement negotiations occurred months after the events which gave rise to the instant grievance and therefore they could not have been considered by Stern on February 12th when he made his call-in decisions. As such, these negotiations and the documents arising out of them are not relevant to this case.

2/ Given my conclusions in this case, it is unnecessary to resolve the credibility issue urged by the Union in this case regarding what Dennis Stern allegedly said to Stan Pecor on February 12th.

One point appears to be undisputed and supported by evidence of past practice: Whatever the call-in procedure may be as to other matters, it is clear that the procedure does not pertain to Mechanics. Rather, Mechanics under all the evidence in this case, may not properly be called in until after all other employes have been called and there is further work available. 3/ This practice is also logical, as the County would generally want its Mechanics available to perform needed repairs and Mechanics would normally have the least experience operating equipment.

In these circumstances, I find it unnecessary to decide whether a valid past practice exists that after calling all "beatmen" for their beats, employes must be called out by shop seniority from the shop where the "beat" originates or whether they must be called out by department seniority. 4/ It is clear that David McCarty was available to work and well qualified to perform snow plowing on February 12th and that the County should have called in David McCarty rather than Mechanic Alsteens. Therefore, I issue the following

AWARD

The County violated the parties' working agreement when it failed to offer overtime for snow plowing to Grievant David McCarty.

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- 3/ The proffered evidence regarding the parties' settlement negotiations does not contradict the evidence of past practice regarding the call-in of Mechanics.
- 4/ I also find the case which resulted in the McLaughlin Award distinguishable from the instant case.

The grievance is therefore sustained and the County is hereby ordered to make McCarty whole for the overtime opportunity he lost on February 12, 1994. 5/

Dated at Oshkosh, Wisconsin this 14th day of July, 1995.

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

5/ The Union's request that the County be ordered to delegate call-in duties to someone other than Stern is hereby denied. The County has the management right to continue to delegate management duties to Stern if it wishes.