BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LANGLADE COUNTY (HIGHWAY DEPARTMENT)

and

LANGLADE COUNTY HIGHWAY EMPLOYEES LOCAL 36, AFSCME, AFL-CIO

Case 71
No. 52359
MA-8934

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311, on behalf of Local 36.

Mr. Jeffrey T. Jones, Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, P. O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1995-97 collective bargaining agreement between Langlade County (hereafter County or Employer) and Langlade County Highway Employees, Local 36, AFSCME, AFL-CIO (hereafter Union), the parties jointly requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as an impartial arbitrator of a dispute between them regarding whether the County should have called in Grievant Gary Kamps on January 11, 1995. The Commission appointed Sharon A. Gallagher to hear and resolve the dispute. The hearing was held at Antigo, Wisconsin, on May 16, 1995. No stenographic transcript of the proceeding was made. The parties submitted their initial briefs by close of business on June 22, 1995 and their reply briefs by September 5, 1995. The record was then closed.

Issues:

The parties were unable to stipulate to the issues to be determined in this case. However, the parties stipulated that the undersigned should frame the issues based upon the parties' suggested issues and the relevant evidence and argument in this case. The Union suggested the following issues for determination:

1. Did the County violate the contract and past practice when it did not call in the Grievant on January 11, 1995?

2. If so, what is the appropriate remedy?

The County suggested the following issues to be determined in this case:

3. Did the County violate Article 20, Section C, by failing to call the Grievant into work on January 11, 1995?

4. If so, what is the appropriate remedy?

The parties also stipulated that the issue of whether Grievant Kamps should have been called out for snow plowing on January 11, 1995, was not raised by the Union at any time prior to hearing.

Based upon the relevant evidence and argument in this case I find that the Union's issues more closely reflect the dispute between the parties. They shall be determined herein.

Relevant Contract Provisions:

ARTICLE 13 - CALL PAY

Any employee called back into work outside of his/her scheduled hours of work shall receive one (1) hour of pay at his/her straight time rate in addition to the pay for the actual hours worked.

. . .

ARTICLE 20 - MISCELLANEOUS

. . .

C. When the need arises for employees from within a classification (example, grader operators), to be called or assigned for overtime work, said employees shall be called or assigned on the following basis: First, full-time employees for their normally assigned section or beat; second, the most senior full-time employee in the classification and so on down the list; last shall be the relief operators (part-time) by seniority in said classification. Seniority within the classification for the purposes of this Article, shall mean the time within the classification and not the employment date with the County.

Background:

Gary Kamps, the Grievant herein, has been employed by the County for the past 21 years. For the past five or six years, Kamps has been employed as the Partsman in the County Highway Department. As Partsman, Kamps is responsible for the ordering and inventorying of all parts, supplies and equipment used by the County Highway Department. Kamps stated at the hearing

that prior to January 11, 1995, he has been called in to work in the Parts Department as well as to plow snow, but he has chosen not to go in to work overtime. Kamps also stated that he has indicated to the County that he does not wish to be called in during deer hunting season unless an emergency exists. However, Kamps has never notified the County that he does not wish to be called in at any time for overtime work. Kamps asserted that he has always been called during the Winter season for overtime work whenever the Mechanic has been called in. Kamps stated he believed he had been offered overtime snow plowing work on from one to three occasions last Winter, but that each time he refused the work. 1/

As a general rule, Partsman Kamps works from 7:30 a.m. to 4:00 p.m. When Mr. Kamps is on vacation, sick leave or not at work, the County maintains a list in the Parts Room so that employes may sign out for parts, equipment and supplies that they need both before, and after Kamps' normal work day. Kamps is responsible to account for all of the parts and the inventory of the Parts Room at the end of each year. In doing so, Kamps uses the sign-out sheets that employes provide in his absence so that he can rectify his accounts at the end of each year. In addition, managers, such as former Highway Commissioner Schuman and current Assistant Commissioner/Patrol Superintendent Gene Rogatzke have traditionally handed out oil and other items prior to the beginning of overtime work as well as before Kamps' arrival at work at 7:30 a.m. No grievances have been filed regarding these matters. At times, the Highway Commissioner has assigned a Mechanic to perform some of the Partsman functions or has assigned other employes to hand out supplies when the Partsman is not at work. To date, no grievances

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1/ It was undisputed that, on average, there are 30 Winter storms each year to which the County must respond. Acting Highway Commissioner/Patrol Superintendent Gene Rogatzke stated that he investigated time sheets regarding call-ins from 1991 through 1994, and found that on 15 occasions between November 2, 1991 and December 16, 1994, County Highway Department employes were called in to work and yet Partsman Gary Kamps was not called in. In addition, former Highway Commissioner Schuman stated that during his 14 year tenure as Highway Commissioner, he often did not call in the Partsman even though other employes were called in for overtime work. The record showed that no grievances had ever been filed regarding the County's failure to call in the Partsman prior to the filing of the instance grievance. Foreman Pete Ruesch also stated that neither Kamps nor his predecessor in the Parts Room position was called back to work after 4:00 p.m.

have been filed regarding these assignments.

Approximately three or four years ago, Shop Foreman Pete Ruesch instructed Kamps to leave work regularly at 4:00 p.m. each day. Prior to this, Kamps had been staying at work after 4:00 p.m., whenever the trucks were out on the road in case there were parts or supplies needed for those trucks. Ruesch stated he decided to instruct Kamps to leave work promptly at 4:00 p.m. because there was not sufficient work for Kamps to do after 4:00 p.m. Kamps did not file a grievance regarding this matter. Finally, even when Kamps has been present at work, other employes and managers have been allowed to get equipment and supplies from the Parts Room when Kamps has been busy and unable to assist them. Again, no grievances have been filed regarding these matters.

Facts:

On January 11, 1995 then-Highway Commissioner Schuman and Assistant Highway Commissioner/Patrol Superintendent Rogatzke met at approximately 2:00 or 2:30 a.m. and began to call out Highway Department employes to salt and sand the roads. The day was foggy with freezing drizzle. Schuman and Rogatzke called out five State Beat employes, ten County Beat employes and one Mechanic. That day, employes were not using grader loaders or snow plows. Rather, they were going to salt and sand the roads in icy conditions using other equipment. As employes began to arrive at approximately 3:00 a.m., Schuman and Rogatzke handed out oil, lights and grease as needed. This process took approximately 10 to 15 minutes. On January 11th, Schuman stated that the items that were taken from the Parts Department were written down and signed for, as usual. Foreman Pete Ruesch (Shop Foreman for the past ten years), confirmed the statements made by both Rogatzke and Schuman concerning the County's practice regarding handing out oil, parts and supplies as well as the lack of grievances filed regarding the County's failure to consistently use the Partsman for these duties. 2/

POSITIONS OF THE PARTIES:

Union:

The Union asserted that this case is a simple one because the contract language is clear and unambiguous. Grievant Kamps should have been called in for overtime work on January 11,

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2/ Union President Larry Bogle generally corroborated the testimony of Schuman and Rogatzke regarding the fact that other employes have been assigned to get parts when Kamps has not been at work, and that Managers Rogatzke and Schuman often handed out oil or grease even when the Partsman had been called in to work overtime.

In addition, there was evidence to show that some time in November, 1994, Kamps was not called in to work overtime. However on this date, Rogatzke called Kamps and inquired where he could find a light for a particular truck in the Parts Department. Kamps told Rogatzke where he could find the light. Kamps failed to file a grievance regarding this matter.

1995. Article 20, Section A of the contract clearly prohibits a Foreman from performing bargaining unit work except in emergencies. On January 11th, one of the County Mechanics was called in to work and the Parts Room was opened and items were removed by both bargaining unit and supervisory employes. Thus, Article 20, Section C, required that Kamps, as the only employe who works in the Partsman classification and the only employe who is normally assigned to perform that work, should have been called in to perform Partsman duties which were performed by others on January 11th. The Union asserted that an emergency situation did not exist on January 11th because there were many bargaining unit employes still available for snow removal work. Therefore, the Union asserted that the County had a contractual obligation to call Kamps in either to work in the Parts Room or to plow snow on January 11th.

The Union urged that the County's argument that the Parts Room work available on January 11th was minimal is irrelevant. Rather, the Union argued that this case is a test case which does not involve a de minimis amount of work. Where, as here, the contract language is explicit, the principle activities of a particular classification are involved and the activity is a continuing one, a ruling in favor of the Union (rejecting a de minimis theory) is appropriate. The Union noted that it has granted the County flexibility by not filing grievances over the occasional retrieval of parts and supplies from the Parts Room by other employes and supervisors in the past. The Union asserted that the evidence showed that it was only when Kamps was enroute to work, was unavailable to work, had declined overtime work, was on duty but occupied with other tasks, or when Kamps was not at work after his 4:00 p.m. quitting time, that supervisors and other employes performed Partsman duties without drawing a complaint or grievance from the Union. The Union argued by its prior flexibility that it had not waived its clear contractual right to insist that Parts work be done by the Partsman. Finally, the Union asserted that January 11, 1995 was the only date on which the Partsman was not offered overtime work although the Parts Room was open and items were removed based on the record evidence in this case.

Evidence proffered by the County failed to prove the County's assertion that it was normal for the Partsman not to be called in for overtime work. On this point, the Union observed that the County failed to support its assertions with necessary facts and that Kamps stated without contradiction that he was normally called in when the Mechanic was called in for overtime work.

In any event, the Union contended that the County should have called Kamps in to plow snow on January 11, 1995, based upon his seniority. The Union noted that Kamps never requested not to be called in for snow plowing prior to January 11th and that seven employes with less seniority than Kamps were called in to plow snow on January 11th. The Union therefore sought an award ordering the County to pay Kamps one hour call-in pay plus 3.5 hours overtime pay.

County

The County asserted that because the Union failed to raise the allegation that the County should have assigned Kamps to plow snow on January 11, 1995, it should be foreclosed from raising this issue for the first time at hearing and pursuing it before the Arbitrator. The County therefore urged that the Union's claim that Kamps should have been asked to work overtime plowing snow should be summarily dismissed because the Union raised this issue more than two months after the alleged contractual infraction occurred. The County observed that if the Union were allowed to proceed on this untimely claim by merely citing Article 20, Section C, it could conceivably raise a variety of issues at arbitration which were never previously addressed expressly or implicitly in the grievance procedure.

The County urged that no contract violation had occurred in this case. Here, the evidence showed that the Parts work was de minimis -- lasting only up to ten minutes. In addition, the County argued that the evidence proved that a past practice has arisen whereby items from the Parts Room have been distributed by other employes or management and the Partsman has not normally been called in for overtime. These practices have been adhered to by the County without any objection from the Union. The County also contended that an emergency existing on January 11th, giving the County "good cause" to distribute oil and parts as quickly as possible in the interest of safety and efficiency.

The County observed that no contract provision exists here which would mandate overtime or guarantee that any specific number of employes must be called in to work. The County argued that in Article III, Management Rights, the County reserved the right to "direct all operations . . . maintain efficiency . . . determine . . . personnel by which County operations are to be conducted . . . to take whatever reasonable action that (sic) is necessary to carry out the functions of the County in situations of an emergency." The County noted that even if it had called Kamps in to work, it would have taken him 30 minutes to drive to the Employer's facility and that waiting that long for his arrival would have been less efficient than supervisors and employes retrieving a few cans of oil and a bolt. There was no further work for the Partsman to perform on January 11th. Also, traditionally, distribution of items such as oil, parts and light bulbs, has "normally" been done by supervisors and bargaining unit employes whenever the Partsman is not at work. In any event, the County observed, an "emergency" existed on January 11th which justified the immediate action to distribute two cans of oil and a bolt. And because Kamps was not immediately available when the need to distribute these items arose, other employes could reasonably perform the necessary duties.

The County asserted that past practice could amend the clear language of the agreement, given the strong proof offered in this case and the Union's acquiescence for many years in the County's interpretation of the contract language. In all of the circumstances, therefore, the County asserted that the grievance should be denied and dismissed in its entirety.

Reply Briefs:

Union:

The Union denied that it raised a "new" issue at hearing when it asserted that the Grievant

should have been offered snow plowing work on January 11, 1995. The Union noted that the labor agreement contains no requirements regarding the detail necessary on written grievance forms but that nonetheless, the Union clearly alleged a violation of Article 20, Section C on the grievance form in this case. The Union took issue with the County's "selective" citation of quotations from Elkouri & Elkouri, How Arbitration Works (4th Ed., 1985). The Union also noted that Article 20, Section A prohibits "foremen" from

> . . . performing work normally done by the employes . . . except in cases of emergency. An emergency situation shall be defined as a sudden, pressing necessity, requiring immediate action. Snow removal shall automatically constitute an emergency situation where all qualified operators are either on the job or not immediately available. . . .

The Union asserted that the County failed to prove it had strong justification for ignoring the prohibitory language of Article 20, Section A. In the Union's view, neither the County's Management Rights argument nor its de minimis arguments were supported by the facts so as to be persuasive in this case. The Union observed that the more specific language of Article 20 should control the general language contained in the contract's Management Rights clause. The Union also urged that no "emergency" existed on January 11, 1995. Construction of the phrase "immediately available" (Article 20, Section A), as the County has urged would, in the Union's view, allow the County to destroy the meaning and application of the call-in and overtime provisions of the contract.

The Union also contested the County's proffered past practice evidence. The Union noted that the County's evidence did not conclusively prove that the Grievant was consistently passed over for overtime work in the past or that the Union (or the Grievant) was aware of this pattern of conduct by the Employer. In any event, the Union asserted, the clear rights contained in Article 20, Section C cannot be waived as the County has argued, by prior failures to grieve violations. Thus, the Union sought an award sustaining the grievance.

County

The County urged that the Union's assertion at the hearing that the County should have called in the Grievant to plow snow on January 11, 1995, should be dismissed as untimely. The County contended that the Union has misread Article 20, Section C. In the County's view, Article 20, Section C requires that a "need" must arise before overtime work must be assigned, and that the County alone has the right to determine whether such a "need" has arisen.

In addition, the County contended, the language of Article 20, Sections A and C, is not as clear and unambiguous as the Union has asserted. The County asserted that the past practice proven on the record in this case shows that others have distributed parts and supplies in non-

emergency situations (during, before and after Kamp's normal working hours). The County urged that the language of Article 20, Section A contains a broader definition of "emergency" than the Union would adopt and that because Kamps could not take "immediate action", other County employes were privileged to retrieve parts and supplies from the Parts Room on January 11th.

The County noted that the actual amount of Parts Room work performed on January 11th, support the Commissioner's conclusions that the work was de minimis and that Kamps was not needed at work that day. The County also observed that the Union's assertion was clearly erroneous (based on the record), that a principal function of the Parts Man was to operate the radio. The County also strongly resisted the Union's characterization that the County had failed to prove that Parts Room work was performed in the past at times when the Grievant was not called into work.

Finally, the County urged that the Union's concessions that it has allowed "exceptions" to the general rule that the Parts Man should be called in to perform Parts Room functions, has essentially destroyed the general rule itself. In this regard, the County noted that the fact that in the past the Grievant has not complained regarding other employes performing his work when he has been enroute to the facility, unavailable, offered but declined overtime work, was on duty but otherwise occupied with other tasks, and after 4:00 p.m. when the Grievant had left for work, significantly limit the applicability of this "general rule". Thus, the County urged that the grievance should be denied and dismissed in its entirety.

Discussion:

The initial issue which must be determined in this case is whether the Union timely raised the issue of Kamps' not having been called out on January 11, 1995, to perform snow plowing work. I note that the written grievance as well as all answers and discussions surrounding it centered on the sole issue whether Kamps should have been called out to perform Partsman duties on January 11th. It was not until the instant hearing that the Union claimed that Kamps should also have been offered snow plowing work on said date. In the circumstances of this case, it would be unfair to allow the Union to make the additional claim, at the very last moment, that Kamps was entitled to perform snow plowing work on January 11th. Therefore, I shall not address this issue in this Award.

Upon reading Article 20, Section C, several observations can be made from the language used. The first sentence of the Section implies that someone must determine that a need has arisen for employes to be called or assigned for overtime work within a classification. Absent further directory language in labor agreements, it is generally accepted that the employer should determine whether such needs have arisen. Second, there is no mention of the Partsman classification in Article 20, Section C. In this regard, I note that in Appendix A of the labor agreement, entitled Wages and Classifications, the parties have listed the following classifications under the title of Range I ($12.75 per hour): Mechanic, Blacksmith, Grader Operator, Sign Man, Partsman, Gas Man, Caterpillar Operator, Turnapull Operator, Loader Operator, Paver Operator, Cruz Air Operator, and Shovel Operator. Furthermore, the parties have also listed in Appendix A at Range II ($12.61 per hour), the following classifications: Grader Operator, State Patrolman,

Crusher Operator, Heater Operator, and Hotmix Operator.

Given this list of classifications, the labor agreement at Article 20, Section C, directs that full-time employes should be called out first for their normally assigned section or beat, that thereafter "the most senior full-time employe in the classification and so on down the list" should be called and that "last shall be the relief operators (part-time) by seniority in said classification." (Emphasis supplied). I note further, that Kamps is the only Partsman employed by the County at this time. The labor agreement does not specifically address when or how the Partsman is to be called in or assigned for overtime work except that the Employer must first find a need for the Partsman to perform work in his classification. In this case, the County decided it did not need to call in the Partsman to perform Parts Room work. There is nothing in the labor agreement that would require the County to call in the Partsman for Parts Room work if the County manager's judgment is to the contrary on the point. Thus, the contract language supports the County's argument that the phrase "when the need arises . . ." means the County must first find a "need" for an employe in a particular classification to work, before the County must call in such employes for overtime work.

In addition, assuming the work in question is considered bargaining unit work, many arbitrators rule that where a small amount of bargaining unit work is being performed by management or other unit employes when the regularly assigned unit employe is not readily available, and if the work is only temporarily performed or performed for a special purpose or need and an emergency or other justifying circumstance is involved, employers may be privileged to assign either managers or other bargaining unit employes to perform the small (or de minimis) amount of unit work involved. Furthermore, where there has been a past practice which has shown that the bargaining unit work involved has not been exclusively performed by regularly assigned bargaining unit employes, such past practice may serve to bolster an award in favor of the employer. However, the work should be generally so small as to be considered a permissible exception or as not to constitute an actual injury to the regularly assigned employe or to the bargaining unit in general.

The Parts Room work performed on January 11th was minimal -- lasting less than one-half hour, according to all accounts. 3/ Kamps, the only Partsman, is not regularly assigned to work at 3:00 a.m. and it would have taken him 30 minutes to arrive at work, even if he had been called in to work on January 11th. There was an "emergency" situation in existence on January 11th, pursuant to the definition thereof contained in Article 20, Section C. Thus, the situation which existed on January 11th also fits squarely within the de minimis exception.

3/ Various witnesses testified that to hand out parts, oil and grease on January 11th as well as to retrieve a bolt for a truck, it took from 10 to 30 minutes. Union President Larry Bogle was the only witness who stated that Partsman functions on January 11th took longer than 30 minutes. As Bogel's testimony was uncorroborated by any other witnesses, the testimony of Schuman, Rogatzke and Ruesch is hereby credited.

Furthermore, the evidence of past practice submitted in this case supports a conclusion that Parts Room work has not been exclusively assigned to the Partsman, so that in the situation existing on January 11th, the County could temporarily assign others to perform the small amount of Parts Room work available. I note in this regard, that the evidence also showed that on at least 15 occasions between November, 1991 and December, 1994, Kamps had not been called out to perform Parts Room overtime duties, although other County employes had been called in. Kamps knew that members of management as well as other bargaining unit employes had regularly taken parts, oil and other items from the Parts Room when he was on vacation, sick leave, during deer hunting or otherwise not at work. In this regard, I note that members of management as well as bargaining unit employes regularly sign out for items taken from the Parts Room during Kamps' absences and that Kamps knew of all these instances because he had to track and inventory all items taken from the Parts Room on an annual basis.

It is also clear that sometime in November, 1994, Kamps admittedly instructed Supervisor Rogatzke where, in the Parts Room, he could find a light for a certain truck. On that day, Kamps had not been called in to perform overtime duties, although other County employes had been called in to perform such overtime duties. Kamps did not file a grievance seeking overtime for that day, despite his clear knowledge that Parts Room work had been performed which he had not been offered. Furthermore, three or four years ago, Kamps accepted foreman Ruesch's instructions that he (Kamps) should leave work promptly at 4:00 p.m. each day. Kamps admitted that he knew that other employes had been assigned to work overtime on some of the days thereafter. Finally, Kamps also admitted that he was aware that even when he was at work, other employes and managers had retrieved items from the Parts Room whenever Kamps was too busy to assist them.

In all of these circumstances, the record clearly shows that Parts Room work has not been done exclusively by the Partsman, that in circumstances where the Partsman is absent, both managers and other employes have at times retrieved items from the Parts Room and that Kamps was aware of many of these instances and failed to file any grievances thereon. The above evidence of practice and Partsman Kamps' acceptance of others performing small amounts of his work on a temporary basis, support a conclusion that the County was privileged to assign the small amount of Parts Room work available on January 11, 1995 to managers or other employes. 4/ I therefore issue the following

AWARD

The County did not violate the contract or past practice when it did not call in Grievant

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4/ As noted above, the language of Article 20, Section C also supports the ultimate conclusion in this case.

Gary Kamps on January 11, 1995. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 6th day of October, 1995.

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