BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LITTLE CHUTE VILLAGE EMPLOYEES UNION, LOCAL 130-C OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES and VILLAGE OF LITTLE CHUTE	Case 36 No. 53748 MA-9449

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, 936 Pilgrim Way #6, Green Bay, Wisconsin 54304, for Little Chute Village Employees Union, Local 130-C of the American Federation of State, County and Municipal Employees, referred to below as the Union.

Mr. James R. Macy, Godfrey & Kahn, S.C., Attorneys at Law, 100 West Lawrence Street, P. O. Box 2728, Appleton, Wisconsin 54913-2728, for the Village of Little Chute, referred to below as the Employer or as the Village.

ARBITRATION AWARD

The Employer and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Jeffrey Lautenschlager, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 22, 1996, in Little Chute, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by May 20, 1996.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Is the grievance timely filed pursuant to the requirements of Article 5 of the collective bargaining agreement?

If so, did the Village violate Section 11.03 by failing to call the Grievant in to work December 9, 1995?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I - RECOGNITION

1.01 The Village hereby recognizes that the Union is the sole and exclusive collective bargaining representative for all employees in the Street Department, Water Department, Village Hall Maintenance/Custodial Department and Park Department . . .

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 Except as otherwise specifically provided herein, the management of the Village of Little Chute and the direction of the work force, including but not limited to the right . . . to decide job qualifications . . . together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in the Employer.

ARTICLE 5 - GRIEVANCE PROCEDURE

. . .

5.03

. . .

Step 1: An aggrieved employee . . . shall present his grievance to his immediate supervisor for settlement . . .

Step 2: If the grievance is not settled, it shall, within five (5) working days thereafter, be set forth in writing, signed by the employee and/or Union, given to the grievant's supervisor who shall, within five (5) working days of receipt thereof, give his written answer.

Step 3: If the matter still remains unresolved, the grievance shall, within five (5) workdays after the department head's answer is due, be presented to the Administrator . . .

Step 4: . . . The decision of the arbitrator shall be final and binding upon the parties . . . In making his decision, the arbitrator shall neither add to, detract from, nor modify any of the provisions of this Agreement.

5.04 The parties agree to follow each of the foregoing steps in processing the grievance and if, in any step, the Village representative fails to give his answer within the time limit therein set forth, the Union may appeal the grievance to the next step at the expiration of such time limit. Any grievance not moved to the next step within the time limit following the Village's answer shall be considered settled.

5.05 Time limits set forth herein shall be exclusive of Saturdays, Sundays and holidays, and can be extended by mutual consent of both parties.

. . .

ARTICLE 8 - PAY POLICIES

. . .

8.03 Employees called into work outside their regular work schedule shall receive two (2) hours pay at their regular straight time hourly rate in addition to appropriate premium pay as set forth in Article VII. In no event shall an employee be paid less than one (1) hour at time and one-half (1-1/2) in addition to the call-in pay for such call-ins on Monday through Saturday . . .

ARTICLE 11 - OVERTIME

. . .

11.03 Overtime shall be offered to employees on the basis of their departmental seniority provided such employees are qualified to perform the overtime work. In the event no special

qualifications are required for the performance of duties, such overtime shall be offered on the basis of bargaining unit seniority.

> In the event there is no volunteer throughout the bargaining unit, such overtime work shall be assigned to the least senior bargaining unit employees.

BACKGROUND

The grievance, filed on December 14, 1995, 1/ states the following as the "Circumstances of Facts":

> Village St. Department was called in to plow snow. Then the Village sent a grade I employee to start cleaning sidewalks, a Park Department job and, neglected to call me in and, according to the contract bargaining unit employees by seniority should be called.

The form requests the following remedy:

> I want the two hour call time and the 3 - 4 hours pay that I should have been paid, and, otherwise be made whole. And in the future I also want 11:03 to be followed.

The Grievant presented this grievance to Gene Hojan, the Employer's Director of Public Works, on December 14. After a brief discussion, Hojan indicated to the Grievant that he saw no merit to the grievance.

Hojan prepared a written response denying the grievance on December 14, and delivered it to the Grievant through inter-departmental mail on December 15. The Grievant was, however, on vacation at this time. Sometime on or about December 18 one of the Grievant's co-workers called him at home to advise him that he had received inter-departmental mail. The Grievant came into the office on December 21 to read his mail. He then read Hojan's written denial of the grievance, and drafted the following response:

> Village Employees Local 130-C is notifying you that they wish to have grievance # 3-95 updated to step 3. After presenting this

1/ References to dates are to 1995, unless otherwise noted.

> grievance to my supervisor and, not being able to settle it at step 1. The grievance was handed to him on December 14, 1995 in writing for his review. His denial was returned in writing on December 18, 1995. This grievance is still not settled and, according to the contract it has been handed in to you on December 22, 1995 in the hope that it will be.

The grievance was presented to the Village Administrator, Russell Van Gompel, on December 22. Van Gompel responded in a letter dated January 5, 1996, which states:

> I have review(ed) section 11.03 of the collective bargaining agreement and your grievance. I have found no violation of the contract. In addition, the grievance was submitted to me on December 22, 1995 which is past the timetable established in section 5.03 of the collective bargaining agreement. Grievance number 3-95 is denied.

The bargaining unit consists of employes from the street, park and water departments. James D. Miller is the only park department employe. Miller was on vacation the weekend of December 8. Before leaving work on December 8, the Grievant advised Hojan that he would be available for any overtime which might become available in the park department. With the exception of Miller, the Grievant is the most senior non-street department employe in the bargaining unit.

Hojan and Jeffrey Elrick, the Employer's Street Superintendent, typically determine when to call employes in to plow snow on an overtime basis. On the evening of December 8, Elrick and Hojan, anticipating a snowfall of greater than two inches, determined to call out the entire street department for snow plowing. The plowing began shortly after midnight. Among the street employes called in was Patrick Tourville. After roughly three hours of plowing, Tourville experienced difficulty with the hydraulic system on his plow. He drove the truck to the shop, where it was determined the problem could not be fixed to permit him to continue plowing that morning. Elrick, knowing Miller was on vacation, told Tourville to take the Holder and plow sidewalks. Tourville did so. The street crew worked until roughly 7:15 a.m. on December 9.

The Holder is a piece of equipment capable of grass-cutting, snow-plowing, salting and a variety of other functions. With the attachments necessary to each function, the Holder is roughly a $90,000 item of equipment. Its manufacturer recommends a limited number of employes operate the Holder and go through four to five hours of training to operate it. Miller, Tourville and one other street department employe have had that training. The Grievant has not.

There is no dispute that park department employes typically remove snow from Village sidewalks while street department employes typically remove snow from Village streets. Street department employes called in on overtime may be assigned duties in other departments on their completion of snow plowing. Those duties may include removal of snow from sidewalks. Such reassignments have occurred in overtime situations, but more commonly occur when overtime work spills over into normal work hours. The Village has not, in the past, sent street department employes home after calling them in to plow snow from streets to permit a call-in of park department employes to clear sidewalks.

For the snowstorm of December 8 and 9, Martin Marasch, who was then the Village's Parks Director, determined not to remove snow from sidewalks until Miller returned from vacation. Elrick offered the work to Tourville only because his plow had broken down.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union states the issue for decision thus:

> Did the Village violate Section 11.03 of the collective bargaining agreement when it did not call in the most senior available bargaining unit employee to do snow removal in the parks department?

Before addressing this issue, the Union contends that the Employer's timeliness issue lacks merit. The issue concerns the processing of the grievance at the third step of the grievance procedure. The Employer's contention that the grievance violates Section 5.03 is, according to the Union, flawed. Since Hojan did not formally deny the grievance until December 15, the Union concludes that the Grievant's filing of the grievance with Van Gompel on December 22 was timely, whether or not December 22 is treated as a holiday. Beyond this, the Union argues that Section 5.03 dates the relevant timeline from the date "the department head's answer is due." That date would have been December 21, thus making the December 22 filing timely.

Turning to the merits, the Union argues that Section 11.03 "establishes a priority system as to how overtime work is assigned within the entire bargaining unit." That priority system requires overtime to be offered to employes within each of the Employer's four departments, and then offered "on the basis of overall unit seniority" to qualified employes if the overtime cannot be filled by intra-departmental volunteers.

Prior to the overtime in dispute, the Union had advised the Employer that it was concerned about extra-departmental assignment of overtime and the Grievant had specifically advised the Employer that he would be available for overtime assignment. Because the park department's sole employe was on vacation at the time of the overtime opportunity, the Grievant was the next available employe for assignment under Section 11.03. The Union asserts that Section 11.03 must be read to mandate the use of "bargaining unit seniority" to assign work which "crosses over departmental lines."

The Employer's contention that the break-down of a snow plow required the assignment it made is unpersuasive, according to the Union. Rather, the Union argues that Section 11.03 required the Employer to either offer the parks department work given to the snow plow operator to the parks department employe or to the most senior unit employe if the parks department employe was unavailable. The reassignment of work to the streets department employe should have been of work within the street department. Any other work, according to the Union, must be assigned under Section 11.03.

The Union notes that it does not dispute the Employer's right to assign employes across departmental lines during normal work hours. Those rights do not, however, play any role in the assignment of overtime, which must conform to the requirements of Section 11.03. Some overlap may occur during overtime situations which run into a normal work day. In such situations, the Employer's right to assign work across departmental lines can be acknowledged, provided the assignment occurs during normal work hours. This overlap does not, however, apply to weekend work.

On the facts posed by the grievance, the Union argues that the Employer could have complied with Section 11.03 either by sending home the street department employe whose truck broke down or by calling the Grievant in to do the work assigned to the truck operator. The Employer's failure to do either mandates compensating the Grievant, at his overtime rate, "for the hours that he would have been called in for on the morning of December 9, 1996."

The Employer's Initial Brief

The Employer states the issues for decision thus:

1. Is the grievance timely filed pursuant to the requirements of Article 5 of the collective bargaining agreement?

2. Did the Village violate Article 11.03 of the collective bargaining agreement when it reassigned an employee previously called in from snowplowing to sidewalk snow removal when the employee's snowplow broke down?

The Employer argues initially that the grievance was not timely filed under Section 5.03, Step 3 and thus must be considered "settled" within the meaning of Section 5.03 Step 4 and Section 5.04. It is, according to the Employer, undisputed that the Grievant's supervisor denied the grievance on December 14, while the Grievant did not file the grievance at the next step until December 22. The express grievance timelines are enforced by Section 5.03, Step 4 and Section 5.04. The Employer concludes that a failure to enforce those timelines would be an abuse of arbitral authority.

If the merits of the grievance are considered, the Employer contends that it has not violated the agreement. Noting that the initial overtime call-in has not been challenged, and that street department employes "have historically been involved in a wide range of snow removal assignments," the Employer concludes that an incidental assignment of sidewalk snow removal cannot be considered a violation of Section 11.03. The Employer summarizes the point thus:

> Here, all overtime was provided to the Street Department based on work . . . historically done by those employees. The assignment to sidewalk snow removal did not represent a new overtime event.

That the additional work was caused by an unanticipated equipment breakdown only underscores the validity of this conclusion.

Beyond this, the Employer urges that the Grievant was not trained in the use of the Holder, which is "a very expensive piece of equipment and is utilized only by those employees trained to utilize that piece of equipment." Because the manufacturer requires four hours of training to prepare an operator to use the Holder, the Employer concludes that it properly used its authority under Article 2 to determine the Grievant was not qualified to operate it. That Section 11.03 limits overtime assignments to qualified employes underscores the validity of this conclusion. Nor can it persuasively be asserted, according to the Employer, that it was obligated to tailor the work assignment to equipment the Grievant is qualified to use.

Characterizing the assertion that it can be obligated to send one employe home only to call

in another in the event of an equipment breakdown as "an absurd interpretation of the bargaining agreement," the Employer argues that the Union's interpretation of Section 11.03 must be rejected. Viewing the evidence as a whole, the Employer concludes that the grievance should be dismissed as untimely or denied on its merits.

The Union's Reply Brief

The Union notes initially that the Employer ignores the language of Section 5.03 which sets the relevant timeline at the point the "department head's answer is due," and fails to "make any allowance for the holiday provisions of Article 13, Section 13.05."

Turning to the merits, the Union contends that the Employer fails to distinguish between its general right to assign under Article 2 and its right to assign overtime under Section 11.03. Evidence that it can make inter-departmental assignments during work hours has no bearing on this overtime grievance. Beyond this, the Union notes that the employe whose truck broke down could have been sent home without the Employer incurring any liability under Section 8.03. That the Employer was under no obligation to assign the street department employe any work made the Grievant's call-in both possible and desirable. The Union puts the point thus:

> It is not an absurd result of Section 11.03 of the contract to ask that this situation be remedied by either replacing the individual with an employee offered such work by bargaining unit seniority or in simply sending the least senior Street Department (employe) home.

That the Employer failed to do either mandates, under Section 11.03, that the Grievant "be paid for the hours he would have worked had he been called in on that morning." This payment must, the Union concludes, be made at the appropriate overtime rate.

The Employer's Reply Brief

The relevant timeline under Section 5.03 is, according to the Employer, the department head's actual denial of the grievance. That denial occurred on December 14, and the Employer concludes the grievance cannot be considered timely processed to Step 3 on December 22.

The Employer notes that its assignment of sidewalk snow removal conforms to established and unrefuted practice. That the agreement does not distinguish between overtime and non-overtime inter-departmental assignments concerning the type of overtime opportunity posed here underscores the validity of the past practice. The Employer also emphasizes that even if the parks

department employe had been available for assignment, he would not have been called in. The Grievant has, according to the Employer, no greater claim on this overtime.

The Employer underscores the absurdity it views in the Union's position, putting the point thus:

> In other words, assuming that the person assigned to the snow removal duties was not the least senior, the Village should have stopped its snow plowing functions, reassigned the one employee whose plow broke down to drive another plow, and then send the least senior snow plower home . . . Theoretically, it could take hours to simply find and reassign vehicles as now suggested by the Union.

Its assignment of the work within the street department is no more than what has always been done. The Employer concludes no contract violation can be found, and the grievance must be denied.

DISCUSSION

The threshold issue of timeliness cannot be resolved as the Employer asserts without modifying the language of Section 5.03, Step 3. That step requires the grievance to be "presented to the Administrator . . . within five (5) workdays after the department head's answer is due." The Employer reads "due" as "given" to make December 14 the applicable point to date the Union's obligation to process the grievance to Step 3. Step 2, however, gives the department head "five (5) working days" to "give his written answer" to the grievance. Hojan's answer was, under Step 2, "due" on December 21 even though it had been "given" prior to that date. Even if "due" could be read as "given," the Employer's assertion that Hojan's denial of December 14 triggered the Union's obligation to process the matter to Step 3 ignores that Hojan's written answer was not issued until December 15. Step 2, however, requires a "written answer" from Hojan within "five (5) working days" of his receipt of the grievance.

In sum, the Union was required to process the grievance to Van Gompel within "five working days" of December 21, the date Hojan's "written answer" was "due" under Step 2. The Grievant presented the grievance to Van Gompel on December 22, well within this five working day period. To adopt the Employer's interpretation alters the language of Step 2 in violation of the proscription of Step 4 that "the arbitrator shall neither add to, detract from, nor modify any of the provisions of this Agreement." This conclusion makes it unnecessary to address the Union's assertion that December 22, under Section 13.05, cannot be counted as a working day.

The issue for decision adopted above draws from each party's view, without adopting

either party's specific statement of the issue. The Village's statement of the issue focuses on its right to assign, but this general statement obscures the narrow, fact driven nature of this grievance. The Union's view is similarly broad, focusing on call-in obligations posed under Section 11.03. This view also obscures the unique and determinative facts of this case. The issue I have adopted focuses the grievance on its facts.

To address the parties' dispute, it is first necessary to clarify what is in dispute. Section 11.03 governs the offering of overtime. The selection process first seeks volunteers, then defines what happens if there are not enough volunteers to cover the available work. Provided all unit employes are qualified for the work, volunteers are sought first, by seniority, on an intra-departmental basis. If insufficient intra-departmental volunteers are available, the work is "offered on the basis of bargaining unit seniority."

There is no dispute the initial offer of overtime complied with Section 11.03. The entire street department was called in, and each employe offered the overtime accepted it. Village administrators determined that sidewalk plowing could wait. Thus, the Grievant's possible entitlement to the sidewalk cleaning duties performed by Tourville arose solely as a function of the break-down of Tourville's truck at about 3:00 a.m. on December 9.

As noted above, the parties address this call-in on the basis of broad contractual rights. The Village contends its right to assign under Article 2 is broad enough to support Tourville's reassignment to the Holder. The Union contends the reassignment was, in effect, a request for overtime to clean the sidewalks and that this second assignment of overtime violates Section 11.03.

Although the Union's reading of Section 11.03 is persuasive, the facts posed by the grievance do not support its application to the events of December 9. It is difficult to characterize Tourville's reassignment as a second overtime opportunity. Marasch's testimony that the Village determined to postpone cleaning the sidewalks is undisputed. Tourville's reassignment was, then, a way to keep him working until the entire crew left. This was, as the Union aptly notes, not required by the contract. The Village could have sent him home. It is not, however, apparent the courtesy extended to Tourville translates into the Grievant's contractual right to the work. Section 11.03 does not expressly address how an offer of overtime is to be distinguished from an assignment of duties within an overtime call-in. Although the evidence will not support the finding of a binding past practice on this point, what evidence there is supports the Village's view that an incidental reassignment of duties outside of an employe's department does not necessarily warrant a second call-in.

Even if Tourville's reassignment to the Holder is considered a second overtime opportunity, it has not been proven that the Grievant is qualified within the meaning of Section 11.03 and Section 2.01 to operate it. This is not to say the Grievant is incapable of operating the equipment. Rather, the evidence shows that the manufacturer recommends training a few employes in its operation. It is undisputed that the Grievant has not received such training.

That the Employer would prefer Tourville or Miller over the Grievant in the operation of this expensive piece of equipment cannot be found a violation of Section 11.03 on the facts posed here.

In sum, the initial call-in of street department employes for work on December 9 did not violate Section 11.03. Tourville's reassignment to the Holder, after the break-down of his snowplow, has not been proven to be an additional overtime opportunity subject to Section 11.03. Even if it is taken to be within the scope of Section 11.03, the Grievant has not been proven qualified in the operation of the Holder. There has been, then, no violation proven of Section 11.03 regarding the call-in of December 9.

Before closing, it is necessary to tie this conclusion more closely to the parties' arguments. The Employer's right to reassign duties within an overtime call-in is a potentially broad area of conflict, and the conclusion stated above should not be taken beyond its facts. That Tourville was assigned work on the Holder makes the Union's position less persuasive than it would be had Tourville been assigned work "no special qualifications are required for."

The Union persuasively notes that the broad reassignment rights asserted by the Employer could, if taken to their logical conclusion, eviscerate Section 11.03. As the Union persuasively points out, Section 2.01 states the rights its grants are not to be read to the exclusion of other agreement provisions. The Union's otherwise persuasive argument fails on these facts because the opportunity the Grievant seeks was less a call-in opportunity than a courtesy extended Tourville due to an unanticipated equipment break-down. No call-in for sidewalk cleaning was anticipated by the Employer. Had Tourville's plow not broken down, no such cleaning would have occurred. Beyond this, Tourville was assigned work the Grievant was not qualified, within the meaning of Sections 11.03 and 2.01, to perform. Thus, the facts pose no issue regarding the Employer's general right to assign. Rather, the narrow issue posed is whether the Employer was required to make a second call-in to permit the Grievant to fill out the balance of a shift Tourville would otherwise have filled. On the facts posed here, it was not. This does not mean the Employer's right to assign under Section 2.01 can be used to gut Section 11.03. The relationship of those sections must be addressed on a case-by-case basis.

The complexity of a case-by-case reconciliation of Sections 11.03 and 2.01 should not be obscured. The Union asserts Tourville could have been sent home, thus giving rise to the Grievant's claim on the sidewalk work. It can be presumed Tourville could have been sent home. As the Employer points out, however, questions surround how this should be accomplished. The Union's assertion presumes the Employer had no obligation under Section 11.03 to reassign work within the street department to assure the least senior street department employe bore the impact of the equipment breakdown. On the facts of this grievance, this issue may not be posed and the Union's presumption may be appropriate. However, the implications of this issue should not be ignored. If an equipment breakdown prompts a new call-in opportunity, as the grievance asserts, then it is arguable that the Employer could be obligated to call in a snowplowing crew to assure the least senior employe bears the impact of a breakdown. How this squares with prior practice or

sensible snowplowing is not immediately apparent. The issue is not posed by this grievance and need not be addressed. I note it to underscore that the relationship of Sections 11.03 and 2.01 poses significant and potentially complex issues which must turn on the facts of each case.

AWARD

The grievance is timely filed pursuant to the requirements of Article 5 of the collective bargaining agreement.

The Village did not violate Section 11.03 by failing to call the Grievant in to work December 9, 1995.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 31st day of July, 1996.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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