

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, INC.,  
LOCAL 704

and

TOWN OF CALEDONIA

Case 56  
No. 54019  
MA-9520

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc.,  
appearing on behalf of the Association.

Mr. Victor J. Long, Long & Halsey Associates, Inc., appearing on behalf of the Town.

ARBITRATION AWARD

The Association and the Town named above are parties to a collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve a dispute regarding overtime. The undersigned was appointed and held a hearing on July 16, 1996, in the Town of Caledonia, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed briefs by August 30, 1996.

ISSUE:

The parties ask:

Is the Town violating the collective bargaining agreement by not offering overtime to the most senior employee who has experience with the particular work and type of equipment? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE IV - MANAGEMENT RIGHTS

Section 4.01: The Town alone possesses the right to operate Town government and to manage all departments of the Town. All management rights repose in the Town itself, except as to such rights as are specifically modified by the provisions of this agreement. These management rights include, but are not limited to, the following:

- a. To direct all operations of the department.
- b. To determine the kinds and number of services to be performed.
- c. To introduce and/or to change the methods or facilities.
- d. To maintain efficiency of operation by determining the methods, means and personnel by which such operations are conducted.

...

1. The management rights hereunder shall not be construed to supersede the specific articles of this agreement.

...

ARTICLE VII - SENIORITY

...

Section 7.04: Seniority shall be given consideration in all areas.

Section 7.05: Seniority shall be defined as the period of uninterrupted employment with Caledonia commencing with the latest date of hire.

...

ARTICLE XI - OVERTIME

...

Section 11.03: Overtime work shall be offered on the basis

of seniority in employment and experience with the particular work and equipment. In the event no regular full-time employee accepts the opportunity for such overtime work, the highway foreman may either assign such work (1) to part-time or seasonal employees, or (2) to regular full-time employees, but then in the inverse order of seniority of those to whom offered.

. . .

BACKGROUND:

This dispute centers on how overtime is distributed. The parties tried to work out the dispute during contract negotiations but they could not agree on the issue. The Association notified the Town that it would start enforcing the terms of the labor agreement regarding overtime effective January 1, 1996. The parties continued to try to negotiate over the issue in the early part of 1996 and agreed that all the incidents of overtime in 1996 would be treated as one grievance.

The foreman of the Highway Department for the last 20 years is Robert Wittke. The Department always used a system of designating employees as first or second (or primary and secondary operators) on pieces of equipment for assignments. Usually, the person who could run a piece of equipment the best was designated #1, and the #2 person was considered the back up. The dispute over overtime started when Union members asked Wittke to put the #1 and #2 operators in writing. Wittke considered that to be a blessing, that everyone would know where they stood, and he assumed it also meant that the employees would be named #1 and #2 for overtime. Wittke agreed with the Association that no one would be named #1 on more than two pieces of equipment. The equipment operator list that Wittke came up with is the following:

<u>EQUIPMENT</u>	<u>First</u>	<u>Second</u>
No. 13 & 55 Front End Loader	Bill	Bob
No. 19 Grader	Kip	Jerry
No. 21 Grader	Blaine	Mike
No. 20 Mack F.W.D.	Bob	Rod
No. 32 Cat Backhoe	Rich	Blaine
No. 35 Case Backhoe	Bob	Kip
No. 36 Case Bulldozer	Jim	Rod
No. 56 Sh. Machine-Plow	Kip	Jim
No. 57 Striping Machine	Rod	Bill
No. 25 Mower	Jerry	All
No. 29 Mower	Harry	All
No. 31 Mower	Tim	All
Garage Mechanic	Ron	Kip
Tar Kettle	Tim	Rich

Park Department  
Sign Department

Mike            Bob  
Wayne Bill

The problem is that there is another list that the Association deems important -- that is the seniority list, which reads as follows (with the first name being the person with the greatest length of service in the Department):

1. Michael Kuney
2. Ronald Jacob
3. Wayne Crawford
4. Robert Holding
5. James Olson
6. William Jacoby
7. Richard Rogers
8. Kip Sullivan
9. Blaine Pfeffer
10. Rodney Miller
11. Timothy Busse
12. Harry Kingsfield
13. Jerry Luenberg

The Town follows the above seniority list for 90 percent of snow plowing done on overtime, and snow plowing generates about 75 percent of the yearly overtime. However, on January 24, 1996, Bill Jacoby was used to plow snow for one-half hour, although five other employees were more senior. Wittke told Jacoby the previous evening to come in a half hour early 1/ to clean the parking lot before employees come in and park their cars. The front end loader is the best piece of equipment for that job because the work is close to the building. Jacoby was listed as first person on the front end loader, and that's why Wittke chose him for the overtime assignment. No one else was offered the overtime.

On February 4, 1996, Jim Olson spent six hours on overtime plowing snow, although four other employees were more senior. Wittke did not recall why Olson was used in this incident. In several cases included in this grievance, Tim Busse was called in to work overtime for a little more than an hour, usually an hour and a quarter, on lighting the tar kettle. While everyone was trained to light the tar kettle six years ago, the Department has had an explosion with it and Wittke

---

1/ If an employee were called in, he could get two hours minimum pursuant to Section 11.08 of the contract. The two hour minimum call-in conditions are not part of this grievance and will not be part of any remedy.

considers it not the safest machine to operate, especially when starting it. Wittke said that the person who starts it stays with it the rest of the day, and no one wants the tar kettle during the day. That's why he picked someone rather low on seniority to do the job. Wittke was trying to use some common sense and good judgment, and noted that Busse has more experience and no one wants that job.

On June 4, 1996, Bill Jacoby and Wayne Crawford got an hour of overtime each to erect voter signs. Crawford is the Town sign man and Jacoby is #2 on that task. While the voter signs are simple signs, they have to be loaded on a truck, and Wittke used Jacoby out of fairness because he was #2 sign man.

In the case of emergency overtime, Wittke would call the person assigned #1 on the equipment, and if he could not get a response, he would go to the person who is best in the category, the person with the most experience. Then he would go to the top of the seniority list and work down. Wittke acknowledged that most of the employees are experienced at running all the equipment, that it is an excellent crew. In an emergency, Wittke wants the best person to come in to handle the problem. He admits that setting up voter signs is not an emergency. The tar kettle situation is unique, because he has to get someone in early to light it or he would have seven guys standing around. Seniority was not always followed for snow plowing, either. If a grader with a wing was needed, Wittke would use the #1 grader operator before calling the most senior man.

In determining the factor of experience, Wittke judges it by the best person on the equipment. Generally, he considers the person who has worked on the equipment most often is the more experienced person, although an employee could be better at running equipment than others without having the most time on it. Wittke felt his list took both seniority and experience into account.

There was another list designating employees first and second on equipment which was prepared years ago. There were differences and changes in assignments between the old list and the current list. Wittke thought that by putting up a list that designated employees first and second on equipment, it would clarify matters and solve disputes. He posted the list sometime late in 1995.

Ron Jacob is the president of the Association. He was been in the Highway Department for more than 24 years and can operate all its equipment. He is classified as the mechanic and listed as first for that assignment. The Association does not object to having people designated as first and second on pieces of equipment for assignments during the normal working day, but most of the bargaining unit members wanted overtime assigned by strict seniority. So Jacob brought the issue to the bargaining table but found no give on the part of the Town. When Jacob talked to

Wittke on the issue, Wittke indicated that it would take a third party to resolve it.

Jacob has experience on the front end loader, as much as Jacoby, and all five employees above Jacoby in seniority have experience with the equipment. Jacob noted that Mike Kuney has about the same amount of experience on the front end loader as he does, and that Kuney started working for the Town two weeks before he started. Crawford has worked on the loader, and Holding is assigned as the #2 man on it, but they were not offered the overtime on

January 24, 1996, when Jacoby was asked to work overtime. Jacob would have worked it if he had been offered it. Jacob noted that the training to light the tar kettle took only a half an hour. Everyone was trained and shown how to turn the dial which ignites, and then it has to be watched so that it does not over heat.

#### THE PARTIES' POSITIONS:

##### The Association:

The Association believes that the contract language is clear and unambiguous and should prevail in this matter. The Association disputes the existence of a past practice as described by the Town and informed the Town that it did not recognize the alleged past practice and that it would enforce the terms of the bargaining agreement. There was no mutual understanding and agreement in the past of the practice as alleged by the Town. The sole purpose of the equipment operator list was to assign bargaining unit members to certain pieces of equipment during normal working hours. The Association never accepted the idea of using the list for the assignment of overtime. Wittke testified that he just assumed that it was understood that he was going to assign overtime based on the list.

The Association notes that the Town did not amend the labor contract pursuant to Section 30.01. That section of the contract also states that past practices are not a valid defense and cannot override the provisions found in the bargaining agreement. Even if the Town had notified the Association that it intended to use the list in question for overtime assignments, the Town's reliance on a past practice is flawed because the Association repudiated that practice. The Town was then obligated to negotiate the change into existence, and while it had that opportunity, it did not do so.

The clear language giving seniority consideration is in Section 11.03. The Town has not argued that the language was ambiguous, or that certain members of the bargaining unit were not able to perform the work in question. It would appear that the Town is attempting to change the language through grievance arbitration rather than through interest arbitration.

##### The Town:

The Town argues that Section 11.03 of the labor contract is silent regarding the issue of who determines the level of experience, and that the management rights delineated in Article 4 of the contract places this determination in the hands of management where it gives management the right to maintain efficiency by determining the methods, means and personnel by which such operations are conducted. Wittke testified that in developing the equipment operator list, he considered seniority and experience with the specific equipment as required by the contract. The practice of designating primary and secondary people for various pieces of equipment existed for many years. After the list was put in writing as the Association asked, the Association objected,

feeling that there were some inequities.

While the Association argues that any experience on a piece of equipment will qualify an employee to be equally capable under Article 11.03, this position does not stand up to scrutiny. Clearly there are degrees of experience with any piece of equipment, and someone with many hours of experience operating a piece of equipment is going to be more capable than someone who has only a few hours of experience. The Town believes that the Association is trying to substitute Section 7.04 for any assignment of overtime, and Jacob testified that overtime should be done by seniority.

Furthermore, the Town notes that Section 24.01 demonstrates that the concept of a number one and number two person has existed for a period of time. If the designation of a number one person is acceptable under the terms of the contract, then clearly a number two designation must be acceptable within the parameters of Section 11.03. The Association attempts to replace the judgment of management regarding the efficient operation of the Department, contrary to Section 4.01 of the contract.

#### DISCUSSION:

The Highway Department incorrectly interprets the labor contract when it does not take seniority into account in filling overtime assignments. Section 11.03 states: "Overtime work shall be offered on the basis of seniority in employment and experience with the particular work and equipment." The Department must take into account both seniority and experience with the particular work and equipment, not just experience alone. The Department's method ignores the seniority factor of Section 11.03 and therefore violates the contract.

Seniority is defined as the period of uninterrupted employment with the Town starting with the latest date of hire, according to Article 7.05. It is not seniority with a particular piece of equipment -- that's what experience is. In other words, the person who has the greatest amount of time on a piece of equipment probably has the most experience on it. That person's seniority is a separate and different matter. The Town must consider both elements together. It needs to look at the senior person and ask itself whether this person has experience on the equipment, and if so, that person should be offered the overtime first.

The Town may bypass seniority if the senior person does not have experience with the particular work and equipment. The contract language does not mean that the person being considered has to have the most experience or be the best person on the equipment to do the job. But the person called must have some experience. If the person to be called had no experience with a particular piece of equipment or was not capable of performing the work needed to be done, the Department could bypass that more senior person in favor of someone with the necessary experience. However, the Department has violated the contract where it bypassed more senior employees who have experience on equipment that was used for overtime.



There may be exceptions for emergencies where the Town could prove that it had an exceptional need for a very experienced operator on a particular piece of equipment. Wittke noted that a cave-in of some type could put people in jeopardy. If so, the Town may be able

to show that it had a special need or emergency to focus more on the most experienced person for running equipment because of some danger or exceptional circumstances. However, the routine snow plowing jobs, putting up voter signs, and things of that nature are not the kind of emergencies which would allow the Town to bypass the senior person who has experience. Nothing on the list of incidents involved in the grievance was an emergency of the kind that would allow the Town to bypass the more senior person.

The Town violated the contract when it did not call or ask the more senior employees for plow snow on January 24th and February 4th of 1996. The same holds true for the incidents in May regarding the front end loader and the work erecting voter signs, as well as the March 20th incident.

However, the numerous incidents of lighting the tar kettle, starting in March of 1996 and running through May (at the time of the hearing) are not contract violations without proof that the more senior employees had experience lighting the tar kettle. Jacob and Wittke testified that everyone was shown how to light the tar kettle by someone from the factory six years ago. Being shown how to light it does not constitute experience with that equipment, and as previously noted, the contract calls for taking both seniority and experience into account. While it sounds like it is a simple piece of equipment, it is not particularly safe, and the most dangerous time with the kettle is when it is lit. The Association has not shown that anyone more senior than Busse had actual experience lighting the kettle. Therefore, I find that overtime incidents for lighting the tar kettle do not violate the contract.

#### The Remedy:

The violations that appear on Joint Exhibit #8 are numbers 1, 2, 8, 28, 29, 30, 31, and 32.

The Association filed this grievance on behalf of all Association members and Jacob signed and processed the grievance on their behalf. However, not all senior employees who should have been offered the overtime that was incorrectly given to less senior employees -- such as Jacoby on January 24th, Olson on February 4th, Jacoby on March 20th and May 4th and 7th and June 6th, Crawford on May 7th and June 6th -- would be entitled to overtime pay. The Town does not have to pay all employees more senior to them for its violation, but it has to pay someone for each violation. For example, on January 24th, when Jacoby was assigned the one-half hour of overtime for snow plowing, there were five employees more senior with experience -- Kuney, Jacob, Crawford, Holding and Olson. The Town does not have to give one-half hour of overtime to each

of the five, but to one. Jacob is the person listed as the Grievant, and he should receive the overtime in that instance. The same holds true for the February 4th incident where Olson was called instead of the more senior employees. Six hours of overtime should be given to Jacob as the Grievant, pursuant to Joint Exhibit #8.

For the violation on March 20th, one hour of overtime should be given to Olson, who is listed as the Grievant. For the May 4th incident, two hours of overtime should be given to Kuney. For the May 7th incident, one hour of overtime should be given to Jacob. For the May 7th incident, one hour of overtime should be given to Kuney.

The June 4th incident is somewhat confusing -- Kuney is the listed Grievant for one hour of overtime for the same date for two separate violations, for the same work of erecting voter signs, but because both Jacoby and Crawford were called in ahead of him. The parties could agree to pay Kuney two hours for the violation or split this amount to give the next senior person one of those hours, assuming that Jacob would have come in for the assignment. If Jacob would not have wanted the overtime, Crawford is already the next highest and he got the work, so there would be only one hour of overtime for a remedy on this incident. The parties should be able to work this matter out by themselves. If not, the Town should pay two hours of overtime to Kuney.

This should give the parties a guide as to a complete remedy. However, they are free to fashion a remedy that also suits their needs if they can mutually agree to such a remedy. Otherwise, they will be ordered to follow the above remedy, and I will hold jurisdiction open for a brief period of time to resolve any disputes over it.

#### AWARD

The grievance is sustained.

The Town is ordered to comply with the remedy outlined above as soon as feasible, unless the parties reach a mutual agreement on another remedy. The Arbitrator will retain jurisdiction until November 29, 1996, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered.

Dated at Elkhorn, Wisconsin this 4th day of October, 1996.

By Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator

