

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

KEWAUNEE COUNTY (HIGHWAY)

and

KEWAUNEE COUNTY HIGHWAY EMPLOYEES
LOCAL 1470, AFSCME, AFL-CIO

Case 42
No. 54066
MA-9539

Appearances:

Ms. Elma Anderson, Corporation Counsel, Kewaunee County, 613 Dodge Street,
Kewaunee, Wisconsin 54216-1322, on behalf of Kewaunee County.

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
P.O. Box 370, Manitowoc, Wisconsin 54220-0370, on behalf of Local
Union 1470.

ARBITRATION AWARD

According to the terms of the 1993-95 collective bargaining agreement between Kewaunee County (hereafter County) and Kewaunee County Highway Employees Local 1470, 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 alleged contracting out of the watering of the County Fairgrounds race track to Tri-Star Promotions. Sharon A. Gallagher was designated Arbitrator and held a hearing at Kewaunee, Wisconsin on July 22, 1996. A stenographic transcript of the proceedings was made and received by the Arbitrator on August 6, 1996. The parties filed their briefs by September 12, 1996 and they agreed to waive reply briefs.

Issue:

The parties stipulated that the following issue should be determined by the Arbitrator in this case:

Did the Employer violate the collective bargaining agreement by contracting out the watering of the County Fair Grounds race track for the Tri-Star Promotions stock car races?

If so, what is the appropriate remedy? 1/

1/ Although the Union's grievance occurred in 1995, the Union was not willing to limit itself to a remedy for 1995 only should they prevail in this case. The County objected to the Union's position.

Relevant Contract Provisions:

ARTICLE 18: VESTED RIGHT OF MANAGEMENT

A. GENERALLY

Except as otherwise herein provided:

1. The right to employ, to promote, to transfer, discipline and discharge employees for just cause and the management of the property and equipment of the Highway Department is reserved by and shall be vested exclusively in the Kewaunee County Board of Supervisors through its duly elected Highway Committee and through the duly appointed Highway Commissioner. The Highway Commissioner through authority vested in him by the Highway Committee of the County Board shall have the right to determine how many men there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the Highway Department operations. The County through its Highway Committee and Highway Commissioner shall have the sole right to contract for any work it chooses, direct its employees to perform such work, wherever located in its jurisdiction, subject only to the restrictions imposed by this Agreement and the Statutes of the State of Wisconsin.

2. While it shall be the preferred practice of the County to have all work performed by County employees, when the efficient performance of the County's responsibilities require it, the County, through its Highway Committee and Highway Commissioner shall have the right to subcontract work normally performed by the bargaining unit. The Highway Commissioner shall notify the Union President and Grievance Committee when subcontracting becomes necessary. No work may be subcontracted if any member of the bargaining unit is on lay off at the time, nor shall such subcontracting result in reduction of hours or size of the work force.

...

Background:

Kewaunee County owns the Kewaunee County Fair Grounds which contains a large dirt track, used for stock car racing. The County also leases this track for other purposes not related to this case, such as motorcycle races, off-road races, tractor pulls and snow mobile races.

Kewaunee County has had a labor agreement with Kewaunee County Highway Employees Local 1470, AFSCME, AFL-CIO for many years. The County (lessor) has leased the race track since at least 1989 to a third party, Tri-Star Promotions (lessee) pursuant to a series of separate leases entered into exclusively between Tri-Star and the County. Thus, Tri-Star and the County have had three separate leases covering their relationship regarding the rental of the race track to Tri-Star. Each of these leases has contained the following language:

...

PARAGRAPH FOUR - MOWING AND GRADING. The Lessor agrees to provide grass cutting services as needed. It shall be the responsibility of the Lessor to make any repairs needed to the track and to bring it into proper condition before the beginning of each racing season. During each racing season, the Lessor shall do all grading and watering of the track, including the replacement of clay on the track surface, on a weekly basis and shall bill the Lessee for this service on the time and materials basis, which sums the Lessee shall immediately pay to the Lessor. The Lessee shall not be responsible for any costs incurred by the Lessor in the initial conditioning of the track prior to the beginning of the racing season.

...

Pursuant to the above language, the County has annually employed at least its two most senior Highway Department employees to perform track watering and track preparation work. In doing so, the County has generally used truck #17 and tanker #124 and the two most senior employees have essentially taken turns performing the watering work which is generally done on Mondays and Fridays during the race track season. 2/ The watering work that is done on Fridays prior to the races which are normally held at the County Fairgrounds over the weekend have been performed at the time and one-half rate. The current contract between the County and Tri-Star Promotions is effective until 1998.

2/ The racing season at the County's race track occurs between late April and early September each year. Since at least 1993, the County Highway Department has worked a summer schedule whereby employees work four ten-hour days, Monday through Thursday.

During 1993, senior Highway Department employes Joniaux and Bouril performed approximately one hundred eighty-eight and one-half hours of watering work at the race track; during 1994, Bouril and Fameree performed the watering work at the County's race track for approximately one hundred fifty-eight hours; and during the 1995 racing season, Fameree, Bellin and Papham performed approximately one hundred sixty-one and one-half hours of watering work for the County Highway Department at the race track. 3/ The County billed Tri-Star Promotions for all of the watering work done by its Highway Department employes during the years 1993 through 1995 on a time and materials basis.

The amount of watering work that is needed in any race car season is dependent upon rainfall, temperature, wind and the length of the season. In this regard, the County submitted documentary evidence to show that one event was rained out in 1993, two events were rained out in 1994, no events were rained out in 1995 and in 1996 (through the middle of July) three events had been rained out. As a general rule, the stock car racing season in Kewaunee County covers a maximum of twenty events.

During 1993, Kewaunee County employed forty-five bargaining unit Highway Department employes. During 1994, two Highway Department employes retired and an employe compliment in the bargaining unit of forty-three remained. No Highway Department employes were discharged or laid off during 1993 or 1994. During 1995, the Highway Department employed forty-four bargaining unit employes, having hired one employe. In 1996 the employe compliment remained the same. During the period 1993 through 1995 no employes received less than forty hours per week and no employes were fired or laid off. During the years in question, Highway Department employes received overtime pay for hours worked beyond forty in a week. In 1994, former Highway Department Joniaux retired from County employment and was hired by Tri-Star Promotions as the race track coordinator. The County has no contract with either Tri-Star or any other entity to perform watering work at the County Fairgrounds race track in connection with the stock car racing season.

Facts:

In or around July 1, 1995 Union President Benes had a conversation with Highway Department employes LaFond and Burmeister. LaFond indicated that he had gone to the County's race track at approximately 6:00 a.m. on Friday to place his blanket so that he would have a seat for the stock car races that weekend and he observed that the race track had been watered. Thereafter, Benes called a Union Executive Board meeting in which the Union determined that it

3/ Due to the retirement of Joniaux in early 1994 and the retirement of Bouril in 1995, the watering work was done by County Highway employes Bellin, Fameree and Papham during the 1995 race track season.

should investigate the matter and Benes requested certain documents from the City regarding billings to Tri-Star from 1993 to date. Benes also went to the track and observed Tri-Star employees watering the race track after dark on a Thursday night. Union President Benes also stated that although he had heard rumors to this effect, the Union was never formally notified that Tri-Star employees were performing watering work at the race track. The Union filed its grievance on July 17, 1995 and sought backpay for the years 1993 through the date of the instant hearing on July 22, 1996.

Positions of the Parties:

Union:

The Union argued that the County was fully aware of the fact that Tri-Star employees were performing watering work at the race track in or about 1994-95. Despite this fact, the Union noted the County never informed the Union of this fact and that the County essentially acquiesced in Tri-Star's performing this work, which should have been done by County Highway Department employees pursuant to the County's contract with Tri-Star. Thus, the Union urged, the County's acquiescence in Tri-Star performing some of the watering work at the race track amounted to subcontracting of that work away from unit employees.

The work lost involved both overtime and straight time work by employees in the bargaining unit. The Union noted that because some of the watering work is being done by Tri-Star employees, bargaining unit work has been diminished by that amount. The Union admitted that although no evidence was produced that employees had worked less than full-time as a result of Tri-Star's performance of watering work during 1993 through 1996, the watering work had become normal bargaining unit work which senior bargaining unit employees had expected to perform and that work had been reduced by "subcontracting" to Tri-Star. Because the County failed to state any economic reason for its subcontract, the Union asserted the County was not justified in subcontracting the work, pursuant to Article 18 of the labor agreement. In this regard, the Union noted that no evidence was presented by the County that efficiency was a goal in allowing Tri-Star to perform the County's responsibilities at the race track (Article 18, A(2)).

In addition, the Union observed that the Employer did not give the Union any notice of its intent to "subcontract" under Article 18. Thus, the Union contended that the County was not justified in subcontracting the race track watering work to Tri-Star. The Union urged that the undersigned must decide this case based upon the record and the application of the collective bargaining agreement to the facts herein and find that the Employer had an obligation to conform Article 18, A(2) to its contract with Tri-Star Promotions. Therefore, the Union sought an award in which the grievance was sustained, with an order that the subcontracted work be reassigned to the bargaining unit and that the affected employees be made whole for any lost wages and/or overtime and associated benefits for the period from 1993 to date.

County:

The County argued that it has not subcontracted with anyone to perform watering work at its race track. The County urged that an examination of the record evidence in this case shows that the watering equipment used during 1993-94 and 95 was consistent from year-to-year: In 1993, the County used its equipment to water the race track for nineteen races for a total of sixty-nine hours; in 1994, when there were seventeen races, the County used the same equipment for fifty-eight hours to water the track; in 1995, when there were twenty races, the County used its equipment for sixty-seven hours.

The County observed that in 1995, Tri-Star Promotions used its own equipment to spread water on the County's race track but that Tri-Star's actions in doing so did not amount to a substantive breach of the contract between the County and Tri-Star. Furthermore, the County urged that any decision to pursue a remedy for a purported breach of its contract between the County and Tri-Star belongs solely to the County. On this point, the County noted that the Union is not a party to its lease with Tri-Star. At the most, the County asserted, the Union can claim only some sort of contingent third-party beneficiary status in regard to the County's lease with Tri-Star. Without a more specific right recognized in the collective bargaining agreement, the County urged, the Arbitrator is powerless to grant relief to the Union in this case.

The County also argued that it has a right to subcontract work pursuant to its labor agreement with the Union. On this point, the County observed that Article 18, paragraph A(2) indicates that the County is free to subcontract work so long as no member of the bargaining unit is on layoff at the time and so long as any subcontract does not result in a reduction in hours or the size of the workforce. Thus, the County asserted that in none of the years in question (1993 through 1996) was any member of the bargaining unit on layoff. Nor did any member of the bargaining unit during this period of time work less than full time. Also during this time period, some overtime hours were available during each year. As the collective bargaining agreement contains no guarantee of work hours for bargaining unit members, the County argued that no violation of Article 18 of the labor agreement has occurred here.

In light of this, the County noted that over the years 1993-1995, 3.6 hours per race were devoted to watering in 1993, 3.5 hours per race were devoted to watering in 1994 and 3.3 hours per race were devoted to watering in 1995. The County respectfully suggested that the best measure of the total number of hours devoted to watering is based upon the total number of hours billed for the use of County watering equipment. Therefore no reduction in hours occurred in 1995 when Tri-Star began watering the track under the supposed subcontract.

Under Article 18, paragraph A(2), the only obligation that the County has is to notify the Union if a subcontract should occur. In this regard, the County noted that the Union cannot prevent the County from subcontracting work which would normally be done by bargaining unit employees. Because the County never entered into any formal contract with any subcontractor, the County queried whether there was any duty to notify the Union of a "subcontract." Even if the

County were responsible to notify the Union of a subcontract, the Union is now on notice that the County has or will subcontract some watering work. Therefore, no remedy is required in this case. The County observed that the Union has offered no evidence as to how many hours of watering was in fact done by Tri-Star or how this affected the number of hours of watering

done by Highway Department employees. Should the Arbitrator find in favor of the Union to this point, the County nonetheless urged that the measure of the remedy should be based upon the number of hours that watering equipment was used at the race track.

The County argued that even if a subcontract arose by implication because of actions taken or omitted by the County, this would not violate the Union's collective bargaining agreement. If a subcontract arose by implication, the County argued, it would be unable to provide advance notice to the Union because such activities would be outside of its control. In any event, the County argued that even if Article 18 were violated by the County's actions or inactions, no monetary remedy should lie in this case. The amount of time spent on watering the race track was essentially the same in 1995 as in previous years and bargaining unit employees have not been guaranteed any particular number of overtime hours by the labor agreement. Because no employees were employed less than full-time during the relevant period, and the labor agreement allows the County to subcontract and because the Union has not proved that any County Highway Department employee has been harmed by the County's actions or inactions, the grievance should be denied and dismissed in its entirety.

Discussion:

The central problem in this case involves the legal principle of privity of contract. Here, the Union has argued that its labor agreement has been violated by the County's failure and/or refusal to enforce the rights it has under the County's lease agreement with Tri-Star Productions. The concept of privity of contract is an ancient one in the law. Simply put, where two or more parties enter into a contract or lease they are in privity and the benefits of the contract as well as the obligations thereof flow between them alone. Individuals who are not signatories to the contract between two parties have no rights to receive contract benefits nor can they be bound or obliged to perform contract duties. Similarly, individuals who are not in privity have no right to maintain a cause of action to enforce the underlying contract between other parties. In the instant case, the Union and County Highway Department employees are not parties to the contract entered into between the County and Tri-Star Productions, but merely incidental beneficiaries thereto. 4/

Thus, in the circumstances of this case, the Union has no right to pursue Tri-Star Productions based upon its lease agreement with the County. Rather, the Union must look solely to its collective bargaining agreement for a potential basis upon which to receive a remedy in this case.

The sole section of the labor agreement which deals with third party contracts is Article 18 - Vested Rights of Management. In Section A(1) of Article 18, the County has reserved to itself

4/ The contract in this case was not created to directly benefit either the Union or Highway Department employees and therefore they would be termed incidental beneficiaries.

the "sole right to contract for any work it chooses . . . subject only to the

restrictions imposed by this agreement and the Statutes of the State of Wisconsin." Based upon the evidence in this case and the arguments of the parties, there has been no violation of the Statutes of the State of Wisconsin by the County through its lease agreement with Tri-Star Productions.

In regard to any other restrictions that appear in the agreement, I note, that Article 18, Section A(2) contains the only restriction relevant in this case. In Subsection 2, the County may subcontract work normally performed by bargaining unit employees, ". . . when the efficient performance of the County's responsibilities require it. . . ." Where such a subcontract is entered into by the County, Subsection 2 requires that the Highway Commissioner notify the Union President and Grievance Committee of the subcontract. Finally, Subsection 2 also states:

No work may be subcontracted if any member of the bargaining unit is on layoff at the time, nor shall such subcontracting result in reduction of hours or size of the workforce.

It is significant that no evidence was proffered herein to demonstrate that the County had in fact entered into any subcontract, either formal or informal, with any third party to perform watering work at the County race track. Rather, the evidence showed that at worst, the County acquiesced in Tri-Star's performance of a de minimus amount of watering work. 5/

It is also significant that in this case no evidence was offered to show that any unit employees were laid off or that the size of the workforce was reduced due to Tri-Star's performance of some of its own watering work during the racing seasons 1993-96. In addition, there was no evidence to show that the County had either actual or constructive notice of the nature and extent of the watering work which Tri-Star chose to perform at the race track during 1993-96. Thus, no evidence was offered to show that the County ever made a judgment that the efficient performance of its responsibilities required a subcontract. In addition, I note that the

5/ I note that since 1993, there have been 56 stock car races conducted with an apparent loss of 0.3 hours of watering work per race. This would equal a total of approximately 18 work hours.

County is correct in its argument that there is no contractual guarantee of work hours or overtime for bargaining unit employees. 6/ In all of these circumstances, I find that the Union failed to prove that a violation of Article 18, Section A, Subsections 1 or 2 has occurred.

Based upon all of the relevant evidence and argument in this case I issue the following

6/ The loss of some of these watering hours may also have been due to the shorter racing season in 1994 (17 races) and to varying weather conditions.

AWARD 7/

The Employer did not violate the collective bargaining agreement by contracting out the watering of the County fairground's race track for the Tri-Star Promotions stock car races. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 2nd day of December, 1996.

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

7/ As I have found no substantive violation of Article 18, there can be no violation of the notice provision of Article 18(a)(2).