BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 36, AFSCME, AFL-CIO

and

LANGLADE COUNTY

Case 75
No. 54959
MA-9840

Appearances:
Mr. David Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. Jeffrey T. Jones, Ruder, Ware & Michler, S.C., Attorneys at Law, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1995-1997 collective bargaining agreement that provides for final and binding arbitration. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a grievance about call-in pay. The undersigned was appointed and held a hearing in Antigo, Wisconsin on June 23, 1997, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by August 28, 1997.

ISSUE

The parties ask:

Did the County violate Article 13 of the parties' collective bargaining agreement when it refused to pay the Grievants call pay on December 23, 1996? If so, what is the appropriate remedy?

BACKGROUND

The parties stipulated to a series of facts:

Langlade County and Local Local 36 are parties to a 1995-1997 Collective Bargaining Agreement which is attached hereto as Exhibit A.

The 1995-1997 Collective Bargaining Agreement specifies the terms and conditions of employment of a collective bargaining unit consisting of employees of the Langlade County Highway Department.

1. Certain employees encompassed by the aforementioned collective bargaining unit perform snow plowing duties during the winter months.

2. On Sunday, December 22, 1996, a snow storm occurred in Langlade County with heavy accumulation of snow in the evening hours.

3. On Monday, December 23, 1996, certain employees belonging to the aforementioned collective bargaining unit were on vacation in accord with the provisions of Article 9 of the 1995-1997 Collective Bargaining Agreement.

4. On Monday, December 23, 1996, at approximately 6:00 a.m. the Langlade County Highway Commissioner, Mr. Todd Every, and another Highway Department official, contacted the Highway Department employees who were on vacation and requested that they report to work at 7:00 a.m. to plow snow and clear Langlade County roads. One employee was not given a time to report and reported to work at about 6 a.m.

5. (Deleted)

6. Approximately eight Highway Department employees who were on vacation reported to work on December 23, 1996 and plowed snow and cleared Langlade County roads as requested by Mr. Every.

7. The snow plowing work and other work performed by the Highway Department employees was primarily performed during the hours of 7:00 a.m. to 3:30 p.m.; however, certain employees worked beyond 3:30 p.m.

8. The aforementioned Highway Department employees were paid their regular rate of pay for the work performed between the hours of 7:00 a.m. and 3:30 p.m. and time and one-half that rate for the work performed after 3:30 p.m., on December 23, 1996.

9. Mr. Every permitted the aforementioned Highway Department employees to receive their vacation pay for December 23, 1996, or reserve that day of vacation for use at a later time.

10. One of the aforementioned Highway Department employees chose to be paid vacation pay, and in addition to the vacation pay was paid time and one-half his regular rate of pay for all work performed between 7:00 a.m. and 3:30 p.m. and beyond on December 23, 1996, and other employees chose to be paid their regular rate of pay for the work performed between 7:00 a.m. and 3:30 p.m. on that day, and reserved their vacation day for use at a later time.

11. The aforementioned Highway Department employees were not paid the call-in pay which is set forth in Article 13 of the 1995-1996 Collective Bargaining Agreement with respect to the work performed on December 23, 1996. One employee who was on vacation on December 23, 1996 was called in to work at approximately 3:30 a.m., reported to work at 4:00 a.m., and was paid call-in pay.

12. The call-in provision, Article 13, as included in the 1995-1997 collective bargaining agreement is a new provision; that is, the provision in its terms and as worded was not included in the prior Collective Bargaining Agreement, which is attached hereto as Exhibit B.

13. In the contract negotiations for the current 1995-1997 Collective Bargaining Agreement, the Union proposed the change in the terms and language of Article 13, as indicated by attached Exhibit C.

14. Local 36 subsequently filed a Grievance alleging that Langlade County had violated the terms of the 1995-1997 Collective Bargaining Agreement by failing to pay the aforementioned Highway Department employees call-in pay for December 23, 1996.

15. Attached hereto are the Grievance materials pertaining to the aforementioned Grievance.

16. There is no issue in regard to the timeliness or arbitrability of the Grievance.

Two of the employees who were supposed to be on vacation on December 23, 1996 but were called in to plow snow were Robert Hoyt and Dave Devore. Hoyt was called by Every before 6:00 a.m. and asked to report at 7:00 a.m. Every did not tell Hoyt that he could refuse to come in, and he did not order Hoyt to come in. Hoyt assumed that the County needed help, and since he was not busy, he worked and got time and a half and his vacation pay. Devore was called by a supervisor, Gene Rogatzki, at 6:10 a.m., and told to report at 7:00 a.m. Rogatzki did not order Devore to come in, but told him that it would be nice if he came in. Devore thought that it was an emergency, since employees on vacation would not normally be called in to work. Devore did not understand that he could refuse to come in, and he figured that if he was called, it must be an emergency.

The only employee to be paid call pay under Article 13 was Don Stroble, who was also scheduled to be on vacation on December 23, 1996. According to Timothy Wensel, the current Union President, Stroble was called between 3:00 and 3:30 a.m. on December 23rd and he came in at 4:00 a.m. He was paid one hour call-in pay.

It is common for eight employees to be off or on vacation at that time of the year, and many employees have taken off between Christmas and New Years for several years.

The predecessor collective bargaining agreement contained the following language in Article 13:

Any employee called back to work after his/her regular schedule of hours shall receive no less than two (2) hours pay or the pay for the actual hours worked, whichever is greater.

During the negotiations for the 1995-97 contract, the Union proposed the following language:

Any employee called in to work outside of his/her regular schedule of hours shall receive (2) hours pay in addition to the hours worked.

Jeff Jones, an attorney representing the County and chief spokesman in contract negotiations, took notes that showed that during a negotiation session on November 16, 1994, the County did not agree to the Union's proposed change of two hours plus hours worked. However, the County must have asked the Union if one hour plus hours worked would be acceptable toward the end of that negotiation session. In the next negotiation session held on

December 15, 1994, the proposal for a change in Article 13 appears to have been worked out between the parties by the agreement of one hour plus hours worked. The County calculated how much the hour would cost.

On December 20, 1994, Jones sent Union Representative David Campshure a summary of the settlement. The summary includes Article 13 with some hand written changes made by Jones, who believes that those changes were in response to Campshure's conversation with him. The

summary as written stated:

Any employee called into work outside of his/her schedule of hours shall receive one hour of pay at his/her straight time rate in addition to pay for the hours worked.

The changes made by Jones reflect the language adopted in the contract, and the section reads:

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.

Campshure did not recall who requested changes in the summary prepared by Jones. It is possible that he asked for those changes on behalf of the Union, but his files and notes contain no reference to the hand written changes, and it is also possible that those changes were initiated by the County. Campshure's summary that he prepared for the Union ratification meeting states:

Any employee called in to work outside of his/her regular schedule of hours shall receive one (1) hour pay in addition to the hours worked.

NOTE: Because people rarely get called in for less than two hours, this change should benefit many more people than the old language.

The parties did not discuss a situation like the present one during their negotiations.

THE PARTIES' POSITIONS

The Union

The Union asserts that the contract language is clear, unambiguous and determinative. According to Article 13, employees are entitled to one hour of pay at their straight time rate, in addition to hours worked, if they are called back to work and the call-in is outside of their scheduled hours of work. The Grievants met those criteria in this case. All but one was called at about 6:00 a.m. and asked to report at the normal starting time of 7:00 a.m. for snow plowing. The other Grievant reported at 6:00 a.m. Each Grievant was on approved vacation and not scheduled to work that day. Therefore, each Grievant was called back to work outside of their scheduled hours and is entitled to the one hour of call pay.

While the County emphasized at hearing that the Grievants were not ordered to report to work, the contract states that any employee called back to work shall receive one hour of pay, and there is no requirement that the employee must be required or ordered to report to work before receiving call pay. The one employee noted in stipulation 13A who was on vacation and reported at about 4:30 a.m. received call pay. The Union fails to understand the County's logic wherein that employee was entitled to the call pay benefit and the Grievants were not.

The parties' call pay language is not ambiguous when applied to this case. The Grievants

were called in to work outside of their scheduled hours and entitled to the call pay. The fact that they were not ordered to report is irrelevant.

It is also irrelevant whether the County or the Union proposed the handwritten changes during negotiations that resulted in the current language. The Union could see that if the parties had agreed to language that said that employees get call pay when asked to work within their "regular schedule of hours," the County might have a better argument. But the contract refers to the work outside of "scheduled hours of work." While it is not clear which side proposed the handwritten changes to the parties' tentative agreement, both parties must abide by the language as it appears in the current contract.

The Union submits that the County violated the collective bargaining agreement and asks that each Grievant be awarded one hour call pay at regular straight time rate.

The County

The County agrees with the Union that the clear and unambiguous contract language should be given effect. The arbitrator is without authority to ignore or amend clear and unambiguous contract language, and the parties' contract provides in Article 6 that an arbitrator shall not modify, add to or delete from the expressed terms of the agreement.

The call-in pay provision states in clear terms that any employee called back into work outside of his/her scheduled hours of work shall receive one hour of pay. In accord with the unambiguous language, employees are entitled to call-in pay only if they are called back into work outside of their scheduled hours of work. These employees were not called back into work outside of their scheduled hours of work. They had never been at work on December 23, 1996 and therefore, could not have been called back into work. Therefore, they are not entitled to call-in pay.

Article 12 of the collective bargaining agreement states the employees' scheduled hours of work, noting that they are from 7:00 a.m. to 3:30 p.m. Six of the eight employees who reported to work on December 23, 1996 did so at 7:00 a.m. and worked until 3:30 p.m. Therefore, they were not called back into work to perform work outside of their scheduled hours of work and were not entitled to call-in pay.

Moreover, the County asserts, the obvious intent of Article 13 is to provide employees with call-in pay when they are required to report to work outside of their regularly scheduled hours of work, and the Grievants understood that they were not being required to report to work and could refuse to do so. Mr. Every permitted employees who reported to work on December 23, 1996 the option of claiming vacation pay for that day and getting overtime pay for all work done that day, or reserving the vacation day for a later time.

Further, the County believes that the language of Article 13 should be construed against the Union if the language is found to be ambiguous, since the Union proposed that language in

contract negotiations. There is no evidence that the Union advised the County when it proposed the language that an employee asked to voluntarily report to work during what would be the employee's normal work hours would be entitled to call-in pay. If the Union believed that to be the case, it had an obligation to advise the County and did not do so.

In Reply

The Union

The Union states that the County's logic does not make sense where it contends that since the Grievants were not called back into work and reported at 7:00 a.m., they were not entitled to call pay – while the employee who was called in and reported to work at 4:00 a.m. received call pay. The term "back" as used in Article 13 was intended to make call pay available to situations in which employees are called in to work after having left the work place. If employees are called at 11:00 p.m. on Monday and asked to report at 3:00 a.m. Tuesday, they are entitled to call pay. However, if they are asked when they leave work to report early the next morning, they are not entitled to call pay.

While the County has asserted that the Grievants were not eligible for call pay because they did not perform work outside of their scheduled hours of work, the County is twisting the language to suit its needs. The Grievants were on vacation and therefore not scheduled to work at all on December 23, 1996. The Union contends that they were undeniably called in outside of their scheduled hours of work.

The Union also takes issue with the County's statement that the intent of the language of Article 13 is to provide call pay when employees are required to work. The County is trying to rewrite the language of the call pay article. The language is to compensate employees for the inconvenience of reporting to work when not scheduled and to discourage the employer from disrupting the off duty schedules of employees. And while the County states that it could have simply canceled the Grievants' vacation and required them to work, the County did not cancel vacations and the Union would have grieved such action.

The Union further objects to the County's assertion that the Union proposed the change in the language of Article 13 during contract negotiations, as it is unclear which party suggested the handwritten changes on Joint Exhibit C. In any event, the Union argues, the answer to that question is not pertinent, since the clear and unambiguous language of the contract controls. The

County argues on one hand that the language is unambiguous but then argues on the other hand that it is ambiguous and that the Union never stated during negotiations that call pay would apply under these circumstances. The Union says either the language is ambiguous or it is not, and if it is not, it is improper to modify its meaning by invoking the record of prior negotiations.

The County

The County points out that while the Union acknowledges that the Grievants were not ordered to report to work, it ignores the fact that they understood they were not required to report

to work and could have refused to report to work. Thus, it was not necessary for the Department to explicitly tell them they had the option to refuse to come in to work.

The County believes the Union's reading of Article 13 is absurd, and that under the Union's interpretation, the Grievants would not have been entitled to call pay if their supervisors had called them at 7:01 a.m. and directed them to report to work since they would have been contacted and asked to work during their normal work hours.

The County addresses the employee who was paid call pay when reporting to work at 4:30 a.m. by stating that he reported to work outside of his normal hours of work, and this is consistent with the County's interpretation of the language. The County also asserts that it is logical to assume that this employee was directed to report to work. He was the first to be contacted and was a grader operator whose duties were essential for removing snow.

The County also takes issue with the Union's assertion that it is irrelevant whether the Grievants were ordered to work or not. Under that interpretation, an employee could voluntarily report early for work, or unilaterally cancel a scheduled vacation day and report to work at the normal starting time and get call pay. Such an absurd reading of Article 13 should be avoided. The County agrees with the case cited by the Union, wherein Arbitrator Engmann found that employees were entitled to call in pay when they were required to report to work as directed by their employer. In this case, the Grievants were not required to report to work, and they voluntarily reported to work and therefore are not entitled to call pay.

With one exception, the Grievants reported to work at the start of their normal work day. They were given the option of being paid their wages for working that day and also being paid their vacation pay for the day which would have entitled them to overtime pay for all hours worked, or they could be paid their wages for working that day and reserve their day of vacation to use later. All but one chose to reserve their vacation day to use later. It is apparent that the Grievants simply converted what was a scheduled vacation day to a normal work day. In such circumstances, they were not entitled to call pay.

The County asserts that the evidence indicates that the Union proposed the final changes to Article 13, although the Union is implying that the County proposed changes to the language. The County had no reason to revise the Union's proposed language since the County had already agreed to the Union's proposed language on December 15, 1994, without revisions but with the

reduction from the Union's initial proposal of two hours call pay to one hour. The Union admits that the revisions made to the language as compared to that proposed were advantageous to the Union, and therefore, it is highly unlikely that the County proposed those revisions. The County states that the language most pertinent to this dispute – "called back in to work outside of his/her scheduled hours of work" – remained essentially unchanged in substantive terms from that proposed by the Union and should be construed against the Union.

DISCUSSION

Part of the pertinent contract language is new, and while the County argues that it should be construed against the Union since the Union proposed the language, it is not clear that the Union proposed the exact language adopted by the parties. The parties reached a compromise on the language for the hour of pay, and the hours worked. The language says that employees called back into work outside of their scheduled hours of work get the call-in pay, and it is clear enough on its face. The people on vacation were called in outside of their scheduled hours of work and are entitled to call-in pay.

The County puts special emphasis on the words "called back" to work and believes that the language would mean that employees would only get call-in pay if they were called back in after they left work. However, the County agrees that they would get call-in pay if called back either after eight hours of work or after 40 hours of work. Therefore, the call-in pay applies to Saturdays and Sundays, even though employees generally are not at work in order to leave and get called back in. If employees are called in to plow snow on a Saturday or Sunday, the County would pay the call pay. A call to come into work that comes on late Sunday night or early Monday morning for work on Monday does not fall outside the call pay provision. The employees had already put in a 40 hour week by the time they were called back into work. Additionally, they were called outside of their scheduled hours of work, since they were not scheduled to work at all on December 23, 1996.

Further, the County paid one of the employees – the one who came in at 4:00 a.m. – the call pay, while it denied call pay to the other employees. The employee who reported at 4:00 a.m. was not called back to work after leaving work any more than the other Grievants, under the County's interpretation of the language. While the County claims that this employee worked outside of his regular scheduled hours, so did the others who were on vacation.

While the County argues that the Grievants worked their scheduled hours of work – 7:00 a.m. to 3:30 p.m. – and therefore were not performing work outside of their scheduled hours of work, the fact is that they were not scheduled to work at all because they were on vacation. If they had not been on vacation, they would have been able to report for work at their regular time and this case would not have happened. Nobody who was scheduled to work is claiming call-in pay here. What happened is that the County needed those people on vacation as well as those scheduled to work to plow snow. It is a small price to pay the hour of call-in pay to get people off vacation to get the job done.

While the County asserts that it should not have to pay call-in pay where employees had the option to refuse to come in, the language does not support such a conclusion. The County's argument that employees could voluntarily show up for work early or cancel their scheduled vacations and work and claim call pay is contrary to the language. The conditions for call pay are that the employee is called in for work outside of his or her regular schedule and then actually reports for work. The case cited by both parties involving Portage County deputies is not on point – it involved employees who signed up for overtime assignments in advance and then asked for

call-in pay. This is a case where employees were called to report to work outside of their scheduled hours of work and they did. This is exactly the situation where Article 13 applies to compensate employees.

AWARD

The grievance is sustained.

The County is ordered to pay to the Grievants who were on vacation and came in to work on December 23, 1996, one hour of their straight time pay.

Dated at Elkhorn, Wisconsin this 26th day of September, 1997.

Karen J. Mawhinney
Karen J. Mawhinney, Arbitrator

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