BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LANGLADE COUNTY (HIGHWAY DEPARTMENT)

and

LOCAL 36, AFSCME, AFL-CIO

Case 80
No. 56614
MA-10352

Appearances:

Ruder, Ware & Michler, S.C., by **Attorney Jeffrey T. Jones**, Suite 700, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the Employer.

Wisconsin Council 40, AFSCME, AFL-CIO, by **Mr. David Campshure**, 1566 Lynwood Lane, Green Bay, Wisconsin 54311, appearing on behalf of the Union.

ARBITRATION AWARD

Langlade County, hereinafter referred to as the Employer or the County, and Local 36, AFSCME, Wisconsin Council 40, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. The Union made a request, with the County concurring, that the Wisconsin Employment Relations Commission designate a Commissioner or member of its staff to hear and decide a grievance filed by the Union. The undersigned was so designated. The hearing was transcribed, the parties filed post-hearing briefs, and the record was closed on January 11, 1999.

This case was one of three involving the same parties, all heard on the same date before the same arbitrator. (See **Stipulations**, below)

ISSUE

The parties do not agree as to the statement of the issue.

The Union asks: did the County violate the parties' collective bargaining agreement when it assigned snowplowing duties using Range 1 and 2 equipment to non-union foremen on February 2 and March 19, 1998, thereby denying bargaining unit employes the opportunity to work in a higher classification on those dates? If so, what is the appropriate remedy?

The County inquires whether the County violated the terms of the collective bargaining agreement by permitting foremen to operated graders and/or trucks on February 2 and March 19, 1998, for snowplowing work rather than assigning bargaining unit employes to perform the work. If so, what is the appropriate remedy?

I state the issue as follows: did the County violate the parties' collective bargaining agreement by assigning snowplowing duties involving the use of Range 1 and 2 equipment to foremen on February 22 and March 19, 1998 instead of assigning these responsibilities to bargaining unit employes? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 4 – MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the follow:

A. To direct all operations of the County.
B. * * *
C. To hire, promote, transfer, schedule and assign employees to positions within the County in accordance with the terms of this Agreement;
D. * * *
F. To maintain efficiency of County government operations entrusted to it.
G. * * *
H. * * *
I. * * *
J. * * *
K. To determine the methods, means and personnel by which County operations are to
be conducted.

L. To take whatever reasonable action is necessary to carry out the functions of the County in situations of emergency;

ARTICLE 7 – GRIEVANCE PROCEDURE

* * *

F. Arbitration

* * *

3. Arbitration Procedures: The arbitrator selected or appointed shall meet with the parties at a mutually agreeable time to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union, which shall be final and binding on both parties. The arbitrator shall (not) modify, add to or delete from the expressed terms of the Agreement.

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ARTICLE 13 – HOURS OF WORK AND CLASSIFICATION

* * *

J. Any employee that performs work in a higher classification shall receive the higher rate of pay for that classification. If he/she is performing work in a lower classification, he/she shall receive no lower than his/her regular classification rate.

ARTICLE 21 – MISCELLANEOUS

* * *

A. All foremen shall refrain from performing work normally done by the employees and shall refrain from operating equipment normally operated by the employees, except in cases of an emergency. An emergency situation shall be defined as a sudden, pressing necessity, requiring immediate action. Snow removal shall automatically constitute an emergency situation where all qualified operators are either on the job or not immediately available. The foremen may operate the crusher during break periods when it is operating at the Neva Gravel Pit.

B. * * *

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

STIPULATIONS

The parties stipulated as follows: Testimonies provided in the three hearings conducted on August 27, 1998 (Case 79, No 56613,MA-10351; Case 80,No. 56614, MA 10352; and Case 81, No 56615, MA 10353) are included in the record of all three hearings.

BACKGROUND

This grievance questions the assignment of snowplowing duties involving the use of Range 1 and Range 2 equipment to Langlade Highway Department foremen on February 2 and March 19, 1998.

The position or job title of each employee of the Langlade County Highway Department is defined by the equipment that he regularly operates. Each employee receives either the rate of pay assigned to the particular equipment he regularly operates or the rate for the pay range assigned to piece of equipment he may be temporarily operating, whichever is higher. Range 5 pay is the lowest pay category; Range 1 pay is the highest.

Snowplowing equipment covers three ranges. Employees plowing or removing snow with a grader or loader receive Range 1 pay. Employees plowing a state beat with a truck receive Range 2 pay. Plowing county and town routes earns Range 4 pay.

Prior to the 1997-98 snowplowing season, employees whose regular rate of pay was less than Range 2 pay received Range 2 pay for plowing snow with a grader. Since Range 2 grader pay is now eliminated from the collective bargaining agreement between the parties, under the current 1998-2000 collective bargaining agreement between the parties, employees who plow snow with a grader receive Range 1 pay.

On February 2, 1998, Highway Department employees were required to report to work early to plow snow. Two bargaining unit employees were unable to report for medical reasons. One, Don Strobel, a Range 1 Loader Operator normally plowed a regular beat with a grader. The other, Jim Rose, a Range 4 Truck Driver, normally plowed a regular beat with a truck.

To replace the two unavailable employees, the Highway Commissioner assigned Jim Owen (a Range 1 Grader Operator and bargaining unit member) to plow Strobel's regular beat with a grader, Michael Kennedy (a foreman) to plow Rose's regular beat with a truck, and Wence Husnick, (another foreman) to plow Jim Owen's regular beat with a truck. Owen's assignment was based on his familiarity with that particular beat.

On March 19, 1998, Highway Department employees were again required to report to work early to plow snow. Again, two bargaining unit employees were unavailable for work: Larry Boyle (a Range 1 Grader Operator) was on vacation and Jan Mytas (a Range 1 Bulldozer Operator) was sick.

To replace the two unavailable employees, the Highway Commissioner assigned Foreman Wence Husnick to plow Boyle's regular beat with a grader, Joe Kirsch (a Range 3 Truck Driver and bargaining unit member) to plow Jan Mytas' regular beat with a grader, and Foreman Michael Kennedy to plow Kirsch's normal (regular) beat. Kennedy was believed to be familiar with Kirsch's normal snowplow route.

Kirsch's assignment to what was normally Mytas' route resulted in Kirsch receiving a higher pay rate than his classification would normally require.

POSITIONS OF THE PARTIES

Union

The Union emphasizes that it is not arguing that the County is not permitted to assign snowplowing responsibilities to its foremen. Instead, the Union argues, the County violated the parties' labor agreement by the manner in which it assigned the foremen their respective snowplowing beats on February 2 and March 19, 1998.

The Union concedes that because all bargaining unit employees were either working or not available for work, an emergency existed by contractual definition. Indeed, the Union points out that because there were fewer employees than snow beats one supervisor had been assigned to plow the Town of Langlade roads for the entire snow season, in response to a request from the Town.

But, argues the Union, according to Article 21, Section A of the labor agreement, foremen can perform bargaining unit work normally done by bargaining unit employees only in cases of emergency. According to the Union, snow removal is deemed an emergency only when all qualified operators are either on the job or unavailable. Thus, says the Union, as to snowplowing all qualified bargaining unit employees must be assigned work before an emergency can be found to exist and foremen assigned to plow snow.

The Union next points to Article 21, Section C. That section, says the Union, provides the order in which work is to be assigned to bargaining unit employees (first, to full-timers normally assigned to the beat, second by seniority to full-timers in the required classification, and last to relief operators by seniority in the classification).

Therefore, concludes the Union, reading Sections A and C of Article 21 in conjunction, when overtime is involved the foremen should not be assigned a beat for snowplowing until all qualified operators have had the opportunity, by seniority, to fill snowplowing vacancies. According to the Union, Section A does not supercede Section C, but must be read in conjunction with it. Citing hornbook authority, the Union contends that the two sections must be read in combination with each other, not in isolation.

Moreover, the Union finds support for its position by the fact the County did not simply slot the foremen into the various vacancies. The Union notes that on each of the days in question, another bargaining unit worker filled the vacancy caused by the absent worker, with a foreman filling in the slot left by the worker thus reassigned. Under this circumstance the Union finds unpersuasive the County's argument that it filled the vacancies by the most simple, straightforward manner possible. According to the Union, the County should have followed the procedures outlined in Section C of Article 21 and not assigned foremen until all qualified operators had been assigned a beat under that section.

By its actions the Union claims the County has denied employees the opportunity to perform work in a higher classification and receive a higher rate of pay. Therefore, the Union argues, the County has violated both Article 13 and Article 21, Section C by the manner in which it assigned snowplowing duties to its foremen on February 2 and March 19, 1998.

Employer

The County also cites hornbook authority in connection with an employer's right to assign bargaining unit work to non-bargaining unit members. Application of these principles demonstrates that the County did not violate any provisions of its collective bargaining agreement with the Union.

In fact, the County contends that its actions on February 2 and March 19, 1998 were in accord with the terms of Article 21, Section A. The County notes that the prohibition in that section against foremen doing bargaining unit work does not apply to cases of emergency. The County further notes that the section explicitly defines an emergency as snow removal where all qualified operators are either on the job or not immediately available.

According to the County, that was precisely the situations existing on February 2 and March 19, 1998.

Moreover, the County argues, its actions on the dates in question were consistent with past practices of the parties. It cites the testimony of its Highway Commissioner and the Local Union President as attesting to the existence of those practices. The County highlights the testimony of both the Highway Commissioner and the Department's Road Superintendent. Both testified that it was a common practice for the County to assign foremen to operate graders and trucks for snow removal purposes.

The County additionally contends that the bargaining unit work performed by the foremen was temporary and *de minimis* in nature – approximately eight hours of work for the two foremen each day. According to the County the monetary impact of that work on the bargaining unit was also minimal – an estimated total of $14.40 for the two days.

The County also argues that Union reliance on Article 13, Section D is misplaced. That section, argues the County, does not *require* that employees be assigned to work in higher

job classifications merely because the work is available. Instead, under the terms of the Management Rights provisions contained in Article 4 of the labor contract, such assignments are discretionary with the County.

Finally, the County urges that its actions were done in good faith and for reasons of safety and efficiency.

Union Reply

The Union takes issue with the County's description of the work performed by the foremen as *de minimis*. According to the Union (and hornbook authority it cites), application of the *de minimis* rule has been rejected where the amount has been small but the principle large.

The Union cites arbitral authority in support of the proposition that the amount of time involved on the dates in question is irrelevant. The Union presents the instant matter as an issue of significance to it.

The Union rejects the County's arguments as to "past practice" because it regards the relevant contract language as clear and unambiguous.

The Union denies that its reliance on Article 13, Section D is misplaced, and asserts that the County's reliance on Article 4 (Management Rights) is misplaced.

Employer Reply

According to the County, the Union concedes that the requirements of Article 21, Section A were met on both days in question, and therefore no violation occurred. The County defines those requirements as 1) all qualified operators are either on the job or 2) all qualified operators are not immediately available.

Neither does the County agree that the *manner* in which it assigned work to its foremen on the days in question violated the parties' collective bargaining agreement. The County is not required to offer work in higher paying classifications to qualified employees in lower paying classifications before assigning that work to foremen under Article 21, Section A, the County argues.

Moreover, according to the County, Article 21, Section C merely sets forth the procedure by which overtime work is to be offered to employees. Article 21, Section A specifically addresses the kind of situation that existed on February 2 and March 19, 1998, contends the County, while Article 21, Section C applies to overtime work in general. The County cites hornbook authority in support of its argument that specific provisions should control over more general ones.

The County further views the term "classification" as it appears in Article 21, Section C as referring to the job classification appearing in the wage appendix, and not to all employees who are qualified to plow snow.

The County further disagrees with the Union's contention that an emergency situation does not exist (for Article 21, Section A purposes) until all vacant beats have been filled in the manner outlined in Article 21, Section C.

The County argues that when a snowfall occurs the County must plow the roads as soon as possible as a matter of public safety. The County believes the Union's interpretation of the contract would delay snow removal operations and endanger the public safety. This, according to the County, would result because under the Union's interpretation the snowplowing beats of absent employees could be offered to employees on overtime only after they completed their own regular beats.

DISCUSSION

Article 21, Section A of the collective bargaining agreement of the parties prohibits foremen from performing bargaining unit work except in cases of emergency. An emergency is defined in the same section as " . . . a sudden, pressing necessity requiring immediate action." Snow removal when all qualified operators are either on the job or unavailable is explicitly described as " . . . automatically constituting an emergency." Put another way, the section protects bargaining unit work for bargaining unit members, but allows foremen to perform the work in cases of emergency.

Section C of the same Article speaks directly of neither foremen nor emergencies, but of overtime. It describes the procedure to be followed when a need arises for employees within a classification to be assigned to overtime work.

Both parties agree that an emergency within the meaning of Article 21, Section A existed on February 2 and March 19, 1998. There was an immediate need for snow plowing (removal) services. All qualified operators within the bargaining unit were either on the job or unavailable due to vacation, sick leave, or convalescent leave. There was no available member of the bargaining unit that was not called in. All available members were engaged in combating the snow removal emergency.

But there were not enough bargaining unit members to plow all the beats. On each date, two unavailable workers had left two slots unfilled. The County chose to fill them with two of its foremen. The Union does not contest the County's utilization of foremen under these circumstances. It is, instead, the emergency duties to which the foremen were assigned with which the Union takes issue. In the Union's words, "(r)ather, the Union alleges the County violated the Agreement by the manner in which it assigned the foremen snowplow beats on the dates in question."

In my opinion, however, the County was within its rights as to the duties it assigned to the foremen on each of the dates in question. I reach this conclusion for several reasons.

The first, of course, is the undisputed fact that an emergency existed on both February 2 and March 19, 1998. By contract language definition that included the element that all available qualified operators were either on the job or unavailable on both occasion.

On both occasions all available qualified operators were called in and assigned to work under circumstance where overtime would likely result. Section C of Article 21 was thus moot, for Section C only describes an apparently fair and orderly procedure through which bargaining unit workers are assigned overtime opportunities. Section C does not speak to the issue of offering employees work in a higher classification.

Article 13 of the collective bargaining agreement does speak to that issue. But Article 13 only provides that any employee that performs work in a higher classification shall receive the higher rate of pay. It does not *require* the County to advance an employee to a higher classification when there is a temporary vacancy.

At the same time, the collective bargaining agreement includes provisions pertaining to the management rights of the County. Article 4, Section K, for instance, specifically grants the County the right to determine the methods, means and personnel by which County operations are to be conducted and Section F allows the County to maintain the efficiency of County government operations entrusted to it. (Both rights, of course, are subject to all of the other provisions of the agreement and applicable law.) Section C authorizes the County to hire, promote, transfer, schedule and assign employees to positions within the County, again, in accordance with the terms of the parties' Agreement.

I find nothing in the agreement that prohibits the assignments given to both foremen and bargaining unit operators on February 2 and March 19, 1998. The assignments appear to have been made in a rational, objective, and thoughtful manner that included assessments of safety and efficiency. Route and equipment familiarity were factors in those assessments and in at least one case resulted in the assignment of a bargaining unit operator (Kirsch) to the work of a higher classification for which he received higher pay.

For these reasons I find that Langlade County did not violate the collective bargaining agreement by its snowplowing assignments to two of its foremen of February 2, 1998 and two on March 19, 1998.

AWARD

The grievance is dismissed.

Dated at Madison, Wisconsin this 12th day of March, 1999.

A. Henry Hempe /s/
A. Henry Hempe, Arbitrator

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