BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LANGLADE COUNTY (HIGHWAY DEPARTMENT)

and

LOCAL 36, AFSCME, AFL-CIO

Case 81
No. 56615
MA-10353

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.

AFSCME, Wisconsin Council 40, 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, 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 December 23, 1998.

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

ISSUE

The parties agree that the issue be stated as follows: (d)id the County violate the parties' collective bargaining agreement when it refused to pay the grievant call-in pay on (for) March 19, 1998? 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. To establish reasonable work rules and schedules of work, in accordance with the terms of the Agreement.

* * *

ARTICLE 7 – GRIEVANCE PROCEDURE

A. Definition: Any difference or misunderstanding which may arise between the Employer and the employee, or the Employer and the Union shall be handled as follows:

* * *

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.

* * *

ARTICLE 13 – HOURS OF WORK AND CLASSIFICATION

A. The employees in the Highway Department shall work eight (8) hours per day, Monday through Friday, forty (40) hours per week.
B. The hours of work shall be 7:00 a.m. to 12:00 noon, and 12:30 p.m. to 3:30 p.m. Monday through Friday. Employees starting work at 7:00 a.m. shall work until 3:30 p.m.

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ARTICLE 14 – CALL-IN PAY

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.

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

On March 18, 1998, the grievant, Bill Majest, an employee of the Langlade Highway Department was either on vacation or personal holiday leave. On the afternoon of that date sometime before 3:00 p.m. the Highway Commissioner placed a telephone call to the Majest residence to notify him that snowplowing duties for the following day were scheduled to begin at 4:00 a.m. instead of the normal starting time of 7:00 a.m. The Commissioner described his call to the Majest residence as a "courtesy call." The Commissioner acknowledged that he did not speak with Mr. Majest but instead left a message with either Mr. Majest's mother or mother-in-law to relay to Mr. Majest. The message was for Mr. Majest to come in the following day at 4:00 a.m. to plow snow.

Mr. Majest did report in the following morning at 4:00 a.m. The Commissioner subsequently denied his claim for call-in pay.

At the Langlade Highway Department one method of notifying employees to come in early the following day for snowplowing duties is to post a notice in a conspicuous place in the Highway Shop sometime prior to the normal daily quit time of 3:30 p.m. However, in the event employees are not notified at the work site to come in early the next day, they are notified by telephone.

In the event telephone notice to come into work early is given on a Saturday or Sunday, call-in pay is authorized without question. It is also the practice to authorize call-in pay in the event the telephone notice to report early the following day is given after 3:30 p.m. (outside scheduled hours of work) on the previous day.

In the instant case, however, the Commissioner based his denial on the fact that prior to 3:00 p.m. (*i.e.* within the scheduled hours of work) he notified a responsible relative in the Majest household to relay to Majest the Commissioner's message. The Commissioner also indicated that if his call to the Majest household had taken place even one minute after the close of normal hours of work (3:30 p.m.) he would have granted the requested call-in pay to the grievant.

The Commissioner described one similar instance where a bargaining unit member was telephoned to report to work early the following day: no call-in pay was awarded, and no grievance was filed. It is unclear, however, whether that employee ever made a claim for call-in pay. From the testimony it is also unclear under which contract term this instance took place, although the 1995-97 term seems the most likely candidate.

On the day of the hearing the grievant was unavailable to testify.

POSITIONS OF THE PARTIES

Union

From the Union's perspective this case is simple. It sees Article 14 as entitling an employee to call-in pay (one hour of straight-time pay in addition to payment for actual hours worked) if two criteria are met: 1) the employee must be called into work; 2) the reporting time specified by the call-in must be outside the employee's scheduled hours of work.

The Union excepts from entitlement to call-in pay any employee who, prior to leaving the Highway Shop at the end of the workday, is directed to report to work the following day at an earlier time than the regular starting time.

The Union believes the grievant in this case successfully meets the two-pronged criteria for call-in pay.

The Union notes that Highway Department management called grievant's home on March 18, 1998, directing that the grievant report to work the following day at 4:00 a.m., some three hours before the regular starting time of 7:00 a.m.

The Union believes the contract language as to call-in pay is clear and unambiguous. The Union cites both hornbook and case law as indicating no need for contract interpretation unless the agreement is ambiguous. That, in the Union's opinion, should be dispositive of the instant matter.

The Union finds irrelevant the actual time the telephone call-in directive to the grievant's home was made. The Union argues that Article 14 does not contain any limitation as to the time of day at which employees must be called to qualify them for call-in pay, and accuses the County of attempting to rewrite contract language. According to the Union, the County is attempting to insert the words "**after 3:30 p.m.**" into Article 14 so the Article would read: "Any employee called, **after 3:30 p.m.** back to work outside of his/her scheduled hours of work shall receive one (1) hours of pay at his/her straight time rate in addition to the pay for the actual hours worked."

The Union disbelieves the County's contention that an employee who receives a call-in directive prior to 3:30 p.m. is not entitled to call-in pay. That, says the Union, is contrary to

the plain language of the Agreement. The Union asserts that the employees who actually worked on March 18, 1998 were not entitled to call-in pay for reporting early the next day because they were not **called** to report, but were notified before the end of the workday. Hence, says the Union, these employees do not meet the criteria for call-in pay.

The Union cites a 1997 arbitration award by Arbitrator Karen Mawhinney as offering support for its current position. LANGLADE COUNTY (HIGHWAY DEPARTMENT), DEC. NO. 54959 (WERC: MAWHINNEY, 9/97). In that case Arbitrator Mawhinney had concluded that employees on vacation who reported to work in response to a call-in were entitled to call-in pay, even though they were directed to report at what would have been their normal starting time of 7:00 a.m. had they not been on vacation.

The Employer

The Employer begins by recounting the history of the call-in pay provision. The 1992-94 Collective Bargaining Agreement between the parties provided that employees called back into work after their regular scheduled hours were to be paid no less than two hours pay or the pay for the actual hours worked, whichever was greater. This was modified in negotiations for a successor 1995-97 Collective Bargaining Agreement to provide that employees called back into work outside of their scheduled hours of work would receive one hour of straight-time pay *in addition* to the pay for the hours actually worked.

The County believes this change resulted in a greater benefit to the employees.

The County notes that while weekday hours of work normally begin at 7:00 a.m., the County may alter the work schedule for snowplowing purposes. It does so by posting a notice in the Highway Shop directing employees to report the following day at an earlier time than the usual 7:00 a.m. starting time. Employees so notified are not contractually entitled to call-in pay, nor has the Union ever claimed otherwise, according to the County.

The County next notes that during the 1996-97 snow season such a notice was posted in the Highway Shop. The County continues that on that occasion a highway department employee who was on paid leave on the date the notice was posted was telephoned prior to the end of that working day and also directed to report the following day at the time specified in the posted notice. According to the County, that employee did so report; that employee claimed no call-in pay; neither did that employee receive call-in pay.

The County asserts that a meeting between County and Union officials on April 2, 1998 resulted in the Union's agreement that the County could change the employees' normal starting time with advance notice, including scheduling employees to report to work earlier than usual.

The County contends that the Union's claim for call-in pay in the instant matter is totally without merit.

The County believes it is vested with a contractual right to temporarily alter the employees' normal daily work hours. This being so, the County posits, the grievant is not entitled to call-in pay for March 19, 1998 since he had been given advance notice of the new starting time.

The County cites hornbook law to support its view that many arbitrators have recognized that except as restricted by the agreement between the parties the right to schedule work remains in management. The County argues that no provision within the Collective Bargaining Agreement specifically and expressly prohibits it from temporarily altering the employees' daily work hours.

The County pursues this point further. Because a provision of the Agreement states that employees starting work at 7:00 a.m. are to work until 3:30 p.m., the County sees an implication ". . . that different starting times and work schedules, at least on a temporary basis, may be established." The County argues that such a conclusion is buttressed by the call-in provision of Article 14. That article, says the County, addresses situations in which employees may be required to report for work at times other than their normal work hours.

Furthermore, continues the County, the Management Rights provisions of Article 4 vests the County with the right to temporarily alter the employees' normal work schedule, a right the County believes the Union has recognized.

Thus, avers the County, because the County has the contractual right to temporarily alter the employees' daily work hours and because the grievant received ample notice of that change, the grievant is not entitled to call-in pay.

The County expands on the latter point. Citing both arbitral law and hornbook assertion, the County contends that arbitrators have long recognized that call-in pay is only appropriate when an employee's off-duty time has been disrupted by a recall to work without notice.

PORTAGE COUNTY (SHERIFF'S DEPARTMENT), CASE 87, NO. 45708, MA-6718 (WERC: ENGMAN, 2/92) is one of the cases cited by the County in support of this argument. The County notes Arbitrator Engman dismissed grievances asking for call-in pay where he found that the employees involved did not unexpectedly have to stop what they were doing or to change plans previously made because of these arrangements.

In the instant case, argues the County, a notice was posted in the workplace on March 18, 1998 before the end of the normal workday. The notice advised employees of the change in their work hours the following day. This was consistent with the Department's practice. At or before 3:00 p.m. on March 18, 1998, the County continues, the Highway Commissioner also left a message with the grievant's mother or mother-in-law to the same effect.

Thus, the County concludes that the grievant is not entitled to call-in pay because: 1) the grievant had more than 12 hours notice that he was to report three hours early the following day, 2) since he was due to return to work the following day his off-duty time was not disrupted, 3) he was not inconvenienced by an unplanned trip to work, and 4) since he didn't work on March 18 he was not "recalled" within the meaning of arbitral law.

The County again notes the previous similar instance that occurred in 1996-97 snow season where call-in pay was neither requested nor given, and claims the instance shows that the Union has also recognized that employees are not entitled to call-in pay under those circumstances.

The County next cites hornbook law as well as arbitral and Wisconsin Supreme Court case law in support of the proposition that an arbitrator lacks authority to disregard or modify plain and unambiguous contract language. Moreover, the County adds, in the instant case Article 7 of the parties' collective bargaining agreement specifically prohibits the arbitrator from modifying, adding to or deleting from said agreement.

The County then argues that the grievant is not entitled to call-in pay because the terms of Article 14 of the parties' collective bargaining agreement are quite clear. The County recites the Article: "Any employee called back into work outside 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." (Emphasis by the County)

In the instant matter, says the County, it was impossible to call the grievant "back" into work outside of his scheduled hours of work because he had not been at work at all on March 18, 1998. Instead, County merely changed the grievant's hours of work for March 19, 1998. Since the County had every right to do so and the grievant received advance notice of the change, the grievant is not entitled to call-in pay.

In summary, the County states the grievance should be dismissed because: 1) the County has the contractual right to temporarily alter the daily work hours of the employees in the Highway Department; 2) on March 18, 1998 the Highway Commissioner changed the daily work hours for the following work day; 3) the grievant was scheduled to work on March 19, 1998; 4) the grievant received more than 12 hours advance notice of the change in his work hours; 5) the grievant was not inconvenienced to the degree that he is entitled to call-in pay; 6) there is no evidence the grievant was inconvenienced at all; 7) the grievant was not "called back" into work within the meaning of Article 14.

Union Reply

The Union notes that as to the alleged similar occurrence in which call-in pay was denied it cannot file a grievance on matters of which it is unaware.

The Union finds the County's claim that it has the contractual right to temporarily alter employees' hours of work to be exaggerated. The Union agrees that the County can call employees into work before the normal 7:00 a.m. starting time, but does not believe that right includes ending the workday before 3:30 p.m., even if employees have worked eight hours.

The Union believes that the County's reliance on the PORTAGE COUNTY (SHERIFF'S DEPARTMENT) arbitration award is misplaced. The Union believes the facts of PORTAGE COUNTY (SHERIFF'S DEPARTMENT) are easily distinguishable from the facts of the instant matter. The Union notes that Arbitrator Mawhinney rejected both sides' attempts to cite that case on the grounds that PORTAGE COUNTY involved employees who had signed up for overtime assignment in advance – then asked for call-in pay. LANGLADE COUNTY (HIGHWAY DEPARTMENT), DEC. NO. 54959 (WERC: MAWHINNEY, 9/97).

In the instant matter, says the Union, the grievant did not sign up for overtime in advance.

The Union also attacks the County's view that the grievant is not entitled to call-in pay because he received more than 12 hours notice and was therefore not inconvenienced. The Union points out that Article 14 does not state that call-in pay will not be granted if a certain number of hours of advance notice is given. It simply states that employees who report to work outside of their scheduled hours in response to a call from management are entitled to call-in pay. To consider the number of hours in advance of the new starting time the employee was notified of it would be adding to the terms of the agreement, in the Union's opinion.

The Union also takes issue with the County's emphasis on the word "back" as that term appears in Article 14. The Union cites the *Mawhinney Award* as undermining that view.

The Union believes that all of the necessary criteria for call-in pay have been met in the instant case.

Employer Response

The County does not follow the Union's logic as to why the grievant is entitled to call-in pay as distinguished from the employees at work on March 18, 1998 who are not. It does not make sense, according to the County, to say that employees who were at work on March 18, 1998 and received notice before the end of the workday to report in early the next day are not entitled to call-in pay, but that the grievant, who was advised of the same information by telephone is entitled to it.

The County argues that the contract language cannot address all situations. In recognition of this, says the County, arbitrators interpret and apply the language based on the circumstances and common sense.

The County claims that under the Union's reasoning the County could avoid paying call-in pay to employees by notifying them of a call-in by a hand-delivered note at home, personal notification at home, or an e-mail message by computer. The County does not believe the parties intended such a result when they agreed to the Article 14 language.

The County notes the Union's statement that Article 14 does not contain any limitation as to the time of day at which employees must be called for them to be entitled to call-in pay.

However, says the County, call-in pay is intended to compensate employees for the inconvenience of being required to report to work immediately with little or no notice. The County does not view the circumstances on March 18, 1998 as constituting a call-in entitlement by the grievant within the meaning of Article 14 and arbitral law. Moreover, adds the County, the grievant was given more than 12 hours of advance notice of the earlier report time; he did not have to stop doing what he was doing and report to work. There is no evidence that the grievant had to change his plans or was inconvenienced in any way, according to the County.

The County does not believe that Arbitrator Mawhinney's prior award is of any relevance to this matter. The County distinguishes the *Mawhinney* facts from those of the instant case on the basis that in *Mawhinney* the eight employees who were called-in to work (from their vacations or personal holidays) were clearly inconvenienced. The grievant in this matter was not inconvenienced in any manner.

In summary, the County asserts that the Union's claims are without merit and its reliance on Arbitrator Mawhinney's prior award is misplaced. The County does not believe that the circumstances pertaining to the grievant's notification amount to a call-in situation and therefore the grievant is not entitled to call-in pay.

DISCUSSION

The parties assert that the Article 14 call-in language is clear and unambiguous.

Notwithstanding this agreement in principle, they are unable to agree on how it should be applied in all cases. Though each believes the language to be clear, each would apply the language differently in certain situations.

Article 14 provides for call-in pay:

> 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.

The County and the Union have reached an accommodation as to at least one method through which the County is permitted to change its next-day starting workday hours for on-duty employees without being liable for call-in pay. They have agreed that if the County

posts a written notification to its employees at the work site requiring them to appear the next day at any earlier start time than normal there will be no call-in pay liability to the County.

However, the parties have reached no interpretive accommodation with respect to notifying off-duty employees of changes in next-day starting times. That, of course, is the impetus for the instant case, for the grievant herein was off-duty and unable to read the written notification posted by the Highway Department management as to the next day's early start time.

The County believes the accommodation between the parties as to its on-duty employees should logically extend to its off-duty employees. Specifically, the County believes that if it provides notification to off-duty employees of an earlier next-day start time by 3:30 p.m., there should be no call-in pay liability under Article 14. The Highway Commissioner also expressed the view that if the employee receives that notification as to an earlier next-day start time even one minute after 3:30 p.m. the County is liable for call-in pay to that employee.

The Union, on the other hand, believes that the language of Article 14 should be literally implemented. Under the Union's interpretation any off-duty employee who is notified of an earlier next-day start time is necessarily being called back to work outside scheduled hours of work and is, therefore entitled to call-in pay.

Neither interpretation is entirely satisfactory. The County's view does not include an explanation of what happens if the County is unable to personally reach the off-duty employee by telephone or otherwise by 3:30 p.m. The Union's view gives inadequate credence to the fact that the existing accommodation between the parties as to on-duty employees is not a literal interpretation of Article 14 language.

Under the circumstances, I choose not to express a preference for either interpretation. Ultimately that will be a matter for the parties to work out between themselves in collective bargaining. That does not mean I choose not to resolve the immediate dispute.

For even if the County's interpretation were to be adopted by the parties, it seems to me that the Union prevails in this instance.

The record shows that on March 18, 1998, the Highway Commissioner placed a telephone call to the grievant's house at or before 3:00 p.m. and asked the grievant's mother or mother-in-law to relay a work call-in to him. The Commissioner acknowledges that he did not speak directly to the grievant. (I note, incidentally, that the County would have encountered a similar situation if the grievant's telephone had been answered by an answering service, answering machine, voice mail or e-mail instead of a mother-in-law or mother. In all of these examples the County cannot attest to the time the grievant was actually notified of the change in starting time for the next day's work hours).

Notwithstanding the apparent good faith of the Commissioner, in my view his failure to speak or communicate directly with the grievant prior to 3:30 p.m. (or delegate that task to a subordinate) is fatal to the County's case. The collective bargaining agreement of the parties does not obligate the grievant or any other member of the bargaining unit to remain in touch or "on-call" with the Highway Department during off-duty hours.

Certainly it is possible the grievant received the Commissioner's message almost instantly. It is equally possible that the grievant failed to receive the message until much later that evening. Under the latter circumstances, it seems clear that the grievant would be entitled to call-in pay for all of the classic reasons associated with call-in pay enumerated by the County in its brief (e.g., disruption of off-duty hours on short notice).

It is, of course, the County that normally seeks an earlier start time of work hours, particularly during the snowplowing season. Under that circumstance and in the absence of any contractual obligation on the part of bargaining unit employees to remain "on-call" during off-duty hours it seems reasonable to require that the County communicate directly with the off-duty employees if it wishes to avoid call-in pay liability. Leaving messages with even well-meaning relatives is not necessarily a reliable means of communication; even if the message is delivered, the time of delivery will always be potentially problematic. As previously noted the same problem exists with respect to messages left with an answering service, answering machine, voice mail, or e-mail.

Certainly, in the instant case the grievant ultimately received the message; absent direct testimony from the grievant or a credible third party, however, there is no way to determine what time the message was received by the grievant. The record is barren of such testimony. In my opinion that omission is fatal to the County's case in the instant matter.

Based on the foregoing, in my opinion the County violated the parties' collective bargaining agreement when it refused to pay the grievant call-in pay on (for) March 19, 1998.

AWARD

The grievance is sustained. The County is directed to make the grievant whole by paying him one hour of pay at his straight (1998) rate.

Dated at Madison, Wisconsin this 17th day of March, 1999.

A. Henry Hempe /s/

A Henry Hempe, Arbitrator

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