

BEFORE THE UMPIRE

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 70, AFSCME, AFL-CIO**

and

**KENOSHA COUNTY**

Case 198  
No. 59741  
MA-11392

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**Appearances:**

**Mr. John Maglio**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Mr. Frank Volpintesta**, Corporation Counsel, Kenosha County, appearing on behalf of the County.

**ARBITRATION AWARD**

The Union and County named above, along with Local 1090 of AFSCME and Service Employees Local Union 168, are parties to a Side Letter of Understanding dated May 25, 1999, which runs until December 31, 2003. The Side Letter provides that disputes arising under it are to be submitted to Umpire Karen J. Mawhinney of the WERC. A dispute arose regarding the plowing of snow in December of 2000, and the parties agreed to submit it to the Umpire. A hearing was held on April 10, 2001, in Kenosha, Wisconsin. In addition to the appearances noted above, Samuel Coan appeared on behalf of the Service Employees Local Union 168 and Bob Knutter appeared on behalf of Local 1090, AFSCME (Parks). At the conclusion of the hearing, the parties argued their case orally in lieu of filing briefs.

**ISSUE**

The Umpire agrees with the Union's framing of the issue:

Did the County violate the May 25, 1999 Side Letter of Understanding between Kenosha County and AFSCME Locals 70 and 1090 and Service Employees

Local Union 168 when it used Parks Department employees to plow snow on the North bound frontage road from Highways K to KR on December 30, 2000? If so, what is the appropriate remedy?

### CONTRACT LANGUAGE

The Side Letter of Understanding states: (in relevant part)

This Letter of Understanding is entered into by and between Kenosha County Department of Public Works and its respective unions, Local 70, AFSCME, Local 1090, AFSCME, and Service Employees, Local Union 168.

The parties agree to the following terms:

1. The parties agree that the County has established a Department of Public Works which shares common management and service functions both internally and to the citizens of Kenosha County. The three bargaining units that are named above and are signatories to this agreement are under the Department of Public Works.

2. In an effort to serve the needs of the public, the parties acknowledged that there may exist a need to share equipment and manpower across bargaining unit lines, and such cross over of personnel is only allowed under the following terms:

A. The County may assign personnel from one or more of the bargaining units named herein to assist another of the bargaining unit's employees during emergencies, in addition to specific past practices as established between the parties in accordance with their respective collective bargaining agreements. An emergency is defined as a random isolated occurrence requiring immediate attention where such attention falls outside of the normal operation of each bargaining unit.

B. The County will distribute overtime according to each bargaining unit's collective bargaining agreement. During emergencies, all available overtime hours will first be offered to the bargaining unit that normally performs the work. Any additional overtime hours may be offered to other bargaining unit members included in this agreement if they are qualified to perform the work. The County agrees to not change any work schedules or shifts to accommodate this Letter of Understanding. In no other event will members of Local 168 or Local 1090 be assigned to plow snow from streets, highways or other areas currently plowed solely by members of Local 70.

## BACKGROUND

As anyone who lives in Southeastern Wisconsin knows, the month of December of 2000 was extraordinary for the amount and frequency of snowfall, a month only snowmobile addicts could love. There was some snow most days in December of that year, with more notable amounts being 12 inches on the 11<sup>th</sup>, 5 inches on the 13<sup>th</sup>, nearly 8 inches on the 29<sup>th</sup> and over 3 inches on the 30<sup>th</sup>. The storm at the end of the month started in the evening of the 29<sup>th</sup> and continued the next day, with another 3 to 5 inches of snow predicted for the evening of the 30<sup>th</sup>. The 29<sup>th</sup> was a Friday, and the 30<sup>th</sup> and 31<sup>st</sup> was a major holiday weekend, of course.

Highway Department employees normally plow frontage roads which are part of the state system of roads. On December 30<sup>th</sup>, Highway supervisors Bill Schenning and Bill Neiderer called in two Parks Department employees to help on the frontage roads. The Sheriff's Department had called the Highway Department and asked that the frontage road between Highway's K and KR be plowed due to traffic problems. A deputy called several times for plowing help on the frontage roads. The temperature was below freezing and the wind caused some blowing snow problems.

Two Parks Department employees, Jerry Brown and Nick Murphy, plowed a frontage road or service road to I-94 between Highway K and KR, which is about 6 miles. They were out plowing the frontage road around 7:30 to 8:00 a.m. and spent 11 and ½ hours of overtime plowing, which included plowing some town roads on the West end of the County. They also plowed roads off Highway 50, which are normally done by Highway Department employees Pete Richter, Ken Smith and Tom Stolp. Richter, Smith and Stolp were all working overtime on the 30<sup>th</sup> and had been called in to plow around 3:00 a.m. The frontage roads are usually cleaned up last, unless the Interstate is closed.

Local 70's President Mark Montague reviewed time cards for December 30<sup>th</sup> and found that 50 employees out of 67 were working on overtime. He reviewed the call-in sheets and found that some employees were called and did not answer their phones or refused to come in. He noted that the County has used mechanics to plow snow on occasion, and Wilson Shierk and Jake Brockhaus, both mechanics, were not called in on December 30<sup>th</sup> until 10:00 a.m. or later. Shierk had worked 17 hours of overtime until midnight on the 29<sup>th</sup>. He would not have been called, since the County tries to leave 8 hours between shifts. Shierk came in at noon on the 30<sup>th</sup> and worked 12 hours of overtime. Brockhaus worked 20 hours of overtime, until 11:30 p.m. on the 29<sup>th</sup>. On the 30<sup>th</sup>, Brockhaus came in at 11:15 a.m. and worked 12 and ¾ hours of overtime. Both of them stayed at the shop and worked as mechanics and did not plow snow. The Highway Department tries to keep two mechanics available in the shop during a snow event. Two were not available to work on the 29<sup>th</sup> or 30<sup>th</sup>, which left 4 mechanics to divide up that 48 hour period.

According to the Director of the Division of Highways, Gary Sipsma, the overtime was

offered first to Highway Department employees. In the early hours of December 30<sup>th</sup>, the

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County found 41 Highway employees to be available to plow and 22 unavailable. The County has a contractual obligation to equalize overtime and an informal policy to have employees plow snow no more than 16 hours in one shift.

The Union believes that there are 12 Highway Department employees who could have been called in to plow the frontage roads on the morning of the 30<sup>th</sup>. Certain employees were called around 10:30 to 11:00 p.m. on the 30<sup>th</sup> and the County's records do not show who was working the day or night before or how long they were working or whether they were on vacation. In some cases, the records may be inaccurate. For example, Wright was first called at 10:55 p.m. and did not respond, although comments indicate that he may have been called also at 3:30 p.m. or a.m. There is no time indicated when Tinnen was called, but a no response is indicated. Halvorson was called at 11:07 p.m. and responded. Heckel received a call at 3:30 p.m., but the comments indicated that he was home and busy at 6:00 a.m. Agüero was called at 2:05 p.m. and responded. Cunningham was not called, although he is a night watchman and has a position different than any other in the Department. Dietsche was called at 10:38 p.m., and responded. Cates (Dena) was called at 2:10 p.m. and did not respond. White was also at 2:10 p.m. and responded. White is also a night watchman. Koessl was called at 10:56 p.m. and did not respond, and comments note that there may have been calls at 3:40 p.m. or a.m. Gauger was called at 3:05, and responded, but the records do not show whether that call was a.m. or p.m. Williams was called at 10:57 p.m. and did not respond, and the comments refer to 3:20 a.m. Ball was called at 11:00 p.m. and did not respond, although the comments refer to 3:30 p.m. or a.m. The call-in sheet lists all employees, including those on vacation or on accident and sick leave. The call-in sheet does not show how many hours employees worked before the morning of the 30<sup>th</sup> or if they worked the night shift.

This is the first time that the Department of Public Works has used the Side Letter of Understanding and brought in Parks Department employees to perform work normally done by Highway Department employees.

The Federal Emergency Management Agency (FEMA) gave the County an emergency disaster declaration for snowfall between December 10 and 31 of 2000. FEMA noted in particular the critical need on the 29<sup>th</sup> and 30<sup>th</sup>. The total cost for overtime on just County roads was over \$57,000. The State applies for costs of overtime for state roads from FEMA separately.

### **DISCUSSION**

The Union contends that the snowfall at the end of December did not meet the Side Letter's definition of emergency. Moreover, the Union believes that there were 12 employees who could have been called before anyone from the Parks Department should have been called. The Union asks for the 11 and ½ hours of overtime paid to Parks Department employees be

December 30<sup>th</sup>. The County asserts that the burden is on the Union to show whether or not the 12 employees could have been called, as the records don't show whether they just came off an overtime shift or were in a position to be called. The County notes that the grievance is over \$300 out of \$57,000 of overtime in an emergency.

The Umpire finds that the Side Letter of Understanding was not violated for the following reasons:

1. A state of emergency existed sufficient to invoke the Side Letter's terms. If FEMA is willing to give the County an emergency or disaster declaration, the Umpire would be hard pressed to make a contrary finding. Enough said.

2. The County has operated in good faith under the Side Letter at all times since it was signed. The parties went through the winter of 1999-2000 without incident, through a spring and summer in 2000 with heavy rains and flooding without incident, and went through an extraordinary month of record snowfall in December of 2000, not invoking the Side Letter until the end of the month. This was the first time the County ever used the cross over of personnel under the Side Letter.

3. The Sheriff's Department was asking for the Highway Department to clear the frontage road and had made several calls for plowing.

4. It was a holiday weekend, with more snow expected the evening of December 30<sup>th</sup>.

5. There were a number of Local 70 employees not available – about 1/3 of the force – and some of them were called numerous times. If only two of them that refused to come in had instead agreed to come in to work, the Parks employees may never have been used.

6. The use of two Parks Department employees was *de minimus*. The Highway Department employees incurred \$57,000 in overtime on just County roads, while the Parks Department employees incurred \$300. There was no abuse of the spirit of the Side Letter.

7. Highway Department employees were offered the overtime first. There is no evidence on the record that Highway Department employees were not given the opportunity to work overtime. More on that below.

8. Some of the employees that the Union would have compensated refused to work the overtime when it was offered to them on the 30<sup>th</sup>. To give them money now would be unjust enrichment.

The above factors are not in any particular order of priority, but altogether, convince the Umpire that the County's first experiment with the Side Letter should be given some

There are, however, troubling matters. The County's Exhibit #7 leaves much to be desired. The Umpire understands that when supervisors need to call employees during emergencies, their role is to get help in the door, not to keep accurate records. However, the record here is remiss in some respects, such as failing to show whether certain calls were made in the a.m. or p.m. There is no explanation of whether some employees were working the night before and were not called because of the need for time between shifts. The comments are sometimes confusing and not explained. The sheets have room for more columns, and supervisors should make a better record in the event they need again to show that all available overtime hours were offered first to bargaining unit members in the Highway Department.

The County has sufficiently explained the mechanics – they ended their shifts around midnight on the 29<sup>th</sup>, and if called at 3:00 a.m. on the 30<sup>th</sup>, they would have had only 2-3 hours of sleep before being called back. Both had worked long hours of overtime on the 29<sup>th</sup> and worked long hours of overtime on the 30<sup>th</sup> as well. Neither lost overtime opportunities, and it appears that it would have been unreasonable for the County to call either of them at 3:00 a.m. when it was making its calls for the morning plowing on the 30<sup>th</sup>. Some of the other people who were called in the evening hours of the 30<sup>th</sup> may have had similar circumstances, but it is not clear. This is why the records need to be more definite.

Then the record gets rather messy. For example, Wright was called at 10:55 p.m., but there are three checks for no response and the comments indicate that the answering machine was reached at either 3:30 p.m. or a.m. Don't know which. Then there's Tinnen – no one knows what time he was called. He did not respond anyway. Halvorson was called late and came in – no one knows what he worked the day or night before. Same story with Aguero, though his call came several hours earlier in the afternoon. While Cunningham was not called because he is a night watchman, White is also a night watchman and was called. Don't know what that's about. Diesche's name was crossed off the list but was called anyway and responded. Dena Cates was called and did not respond. Gauger's call was at 3:05 – and the record does not show whether that is a.m. or p.m. It is more likely to be a.m., but that would be speculative too. Williams did not answer a 3:20 a.m. call, according to the comments, and was called again at 10:57 p.m. and did not answer. The Union assumes here that his first call was 10:57 p.m., but the comments might indicate otherwise. That's the reason the records need to be better. Same is true for Ball, who also may have been called at 3:30 a.m. or p.m. or 11:00 p.m.

However, the Union does not have evidence that anyone in the Highway Department lost an overtime opportunity, and it could have brought forth employees with those claims if they indeed existed. The Union only speculates that 12 employees could have been called early in the morning before the Parks Department employees were called, but that is not necessarily true. Koessl and Ball attended the hearing but did not testify that they lost an overtime call. Koessl was called three times but did not respond. Ball was called twice and did not respond.

To the County's credit, it made many, many attempts to reach several employees who did not respond. Wright was called three times, Buehn was called three times, Lichter was called three times, Mercer was called five times, Klawitter was called five times, Koessl was called three times, and four other employees were called at least twice. Some of the same employees the Union would have receive money were those who did not want the overtime and did not respond when called. They should not get any money now. Those employees are Tinnen, Heckel, Dena Cates, Koessl, Williams and Ball. A close look at the record shows that six of the employees the Union believes should have been called came in anyway, and the other six refused to come in or did not respond to the calls. The Highway Department attempted to put everyone to work that it could get to work. Sipsma's testimony that the overtime was offered first to Highway employees was not contradicted.

While the Umpire would like to see a better record than County Exhibit #7 in any future case of this nature, the grievance is denied for all of the reasons noted above.

Dated at Elkhorn, Wisconsin this 23<sup>rd</sup> day of April, 2001.

Karen J. Mawhinney /s/

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Karen J. Mawhinney, Umpire