

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**WINNEBAGO COUNTY (HIGHWAY DEPARTMENT)**

and

**WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES  
UNION, LOCAL 1903, AFSCME, AFL-CIO**

Case 345  
No. 60827  
MA-11738

(Assignment of Overtime — Golliher Grievance)

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Appearances:

**Mr. Richard C. Badger**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, WI 54913, on behalf of the Union.

**Mr. John A. Bodnar**, Corporation Counsel, Winnebago County, 415 Jackson Street, P.O. Box 2808, Oshkosh, WI 54903-2808, on behalf of the County.

**ARBITRATION AWARD**

Winnebago County (Highway Department), hereafter County, and Winnebago County Highway Department Employees Union, Local 1903, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement covering the years 1998-2000, which provides for final and binding arbitration of grievances. Pursuant to a joint request of the parties to the Wisconsin Employment Relations Commission, Sharon A. Gallagher, was requested to hear and decide a dispute regarding the assignment of overtime. Hearing in the matter was held on February 5, 2002, at Oshkosh, Wisconsin. No stenographic transcript of the proceedings was made. The parties submitted initial post-hearing briefs directly to each other with a copy to the Arbitrator on March 13, 2002. The parties reserved the right to file reply briefs but they advised the Arbitrator on May 1, 2002, that they would waive replies. The record was then closed.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

### **ISSUES**

The parties were unable to stipulate to an issue or issues to before the Arbitrator. The Union suggested the following issues for determination:

Did the County violate the collective bargaining agreement when it failed to offer overtime to a senior rollerman on August 20, 1999? If so, what is the appropriate remedy?

The County suggested the following issues for determination:

Did the County violate the collective bargaining agreement when it offered overtime to a less senior employee and failed to offer it to a more senior employee? If so, what is the appropriate remedy?

The parties stipulated that the Arbitrator could frame the issues based upon the relevant evidence and argument in the case as well as their suggested issues. Based on these factors, the undersigned finds that the Union's issues statement is a reasonable statement of the issues before the Arbitrator and it shall be determined herein.

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE 1**

#### **MANAGEMENT RIGHTS**

1. The management of the Winnebago County Highway (including the Landfill), Solid Waste, Airport, and Parks Departments and the direction of the employees in the bargaining unit, including, but not limited to,
  - the right to hire,
  - the right to assign employees to jobs and equipment in accordance with the provisions of this Agreement,
  - the right to assign overtime work,
  - the right to relieve employees from duty because of lack of work or for other legitimate reasons, shall be vested exclusively in the County.
2. In the event of change of equipment, the County shall have the right to reduce the working force if, in the sole judgment of the County, such reduction in the work force is required and nothing in this Agreement shall be construed

to restrict the right of the County to adopt, or install, or operate new or improved equipment or methods of operation.

3. The Union recognizes the exclusive right of the County to establish work rules.

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4. The Union recognizes that the County has statutory and charter rights and obligations in contracting for matters relating to some municipal operations. The right of contracting or subcontracting is vested exclusively in the County.

## **ARTICLE 6**

### **SENIORITY**

The County recognizes seniority. Seniority is defined as the length of County service as it is measured from the last date the employee was hired by the County and continuing until he quits or is discharged. Persons who move from temporary or seasonal positions to permanent positions without a break in their continuous service shall have such service recognized for purposes of establishing a last date of hire.

Eligibility for benefits shall be determined in accordance with the above.

The term "departmental seniority" shall mean length of service within a specific department. For purposes of interpreting this article, the departments are the following:

1. Highway (including Highway Department employees assigned to the Landfill)
2. Parks
3. Airport
4. Solid Waste Department

Seniority shall not be diminished by temporary layoffs or leaves of absence without pay, or while receiving temporary Workers Compensation.

The County shall provide the Secretary of the Union with current department seniority rosters in December of each year.

For posting purposes, the seniority of full-time employees shall be given preferential treatment over part-time employees regardless of department.

## **ARTICLE 20**

### **OVERTIME**

With the exception of hours worked by Janitor-Watchmen and the Custodians at the Airport, and emergencies as defined herein, all time worked outside the regular basic work hours shall be considered overtime and shall be paid for at the rate equivalent to one and one-half (1-1/2) times the employee's regular hourly rate. Custodians at the Airport who work more than eight (8)

hours in a day or forty (40) hours in a week shall be paid at the rate of one and one-half (1-1/2) times the employee's regular hourly rate. Janitor-Watchman shall be paid overtime at the rate of time and one-half (1-1/2) for all hours

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worked in excess of their eight (8) hour shift and for hours worked in excess of forty (40) in their established work week.

All employees except those performing work as Highway Janitor-Watchmen and the part-time Airport Custodian, who are requested to and perform work on any Saturday or Sunday, or on any of the dates provided for in Article 12 of this Agreement, shall receive pay *equivalent to one and one-half* (1 1/2) times their regular hourly rate for each hour worked, and, in addition, holiday pay, if any.

In emergencies, such as snow removal, ice control, and flood control, the County may vary an employee's regular basic work schedule up to three (3) hours. Said shifts shall be for a minimum of eight (8) hours inclusive of a lunch/break allowance.

Except for valid reasons, the employees agree to work overtime in non-emergency situations when requested by the County. For purposes of this Agreement, refusal to work overtime because of the time of day or nature of work shall not be considered valid reasons. Nothing herein shall in any way affect the-management rights of the County with respect to emergency overtime work.

Weekend overtime work, which is scheduled in advance, shall be scheduled and paid for at a minimum of one (1) unbroken hour.

Persons who are voluntarily assigned, on a temporary basis, to a position with a regular basic work schedule different from their regular schedule shall be eligible for overtime pay in accordance with their temporary schedule.

## FACTS

During the Summer of 1999, highway employees who were working on road building, regularly worked four 10-hour days, Monday through Thursday, and then received an extended weekend off (beginning each Friday). During the week prior to Friday, August 20, 1999, the County rented a "sheep's foot" roller from Outagamie County in order to perform road building duties at County GG. This roller has square pegs on it for full-depth rolling and it is used following pulverization of the old road for compacting of the new roadway. Winnebago County does not own a "sheep's foot" roller. To complete this project, the County also rented (on an hourly basis) Outagamie County's pulverizer machine and an Outagamie County operator to perform the duties of the pulverizer operator.

County Highway employee Delap was assigned to operate the "sheep's foot" roller at the start of this project. The County also assigned a County grader operator 1/ to that project at the beginning of the project and he also completed the project. It is undisputed that Delap was given approximately 15-20 minutes of instruction on how to use the "sheep's foot" roller

when he first began operating that equipment during the week prior to August 20, 1999. It is also undisputed that employee Delap was confident in running the “sheep’s foot” roller during the week prior to August 20, 1999. Union Representative Lewis Clark III stated that anyone at the Highway Department can operate a “sheep’s foot” roller but that it takes craftsmanship and experience to be good at operating a roller machine.

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Highway Superintendent Rasmussen requested that Delap and the grader operator perform overtime duties on Friday, August 20, 1999, in order to finish the County GG project. It is unclear exactly how many hours the “sheep’s foot” roller was operated on overtime by Delap on August 20, 1999. However, it is clear that the County GG project was finished on August 20<sup>th</sup>, with the completion of the overtime work.

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*1/ No evidence was offered to show who this operator was or what seniority he had.*

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Superintendent Rasmussen stated that it is County past practice to assign overtime on the basis of seniority if all things are equal. However, Rasmussen stated that in regard to the County GG project, all things were not equal because the County wanted to make sure that there was continuity of work on the project when it assigned the employees who had begun the project to complete it by performing overtime on August 20, 1999. Rasmussen stated that he felt more comfortable with Delap performing the roller duties because Delap had been on the project at County GG all week and Rasmussen believed that he was following the contract when he assigned Delap to perform overtime on August 20, 1999. Finally, Rasmussen stated that it would have taken more time to get a new roller operator familiar with the County GG project and train him/her on the “sheep’s foot” roller on August 20<sup>th</sup>.

The Grievant, David Gollither, is a senior roller operator who performs asphalt rolling for the County. 2/ Rasmussen stated that Gollither would have been qualified to perform the work on the “sheep’s foot” roller and that others in the department could have performed the work as well. Rasmussen also stated that others who are more senior than Gollither, but were not roller operators, could also have performed the work but that he did not ask any of them, preferring to keep the same crew on the project to the end of that project for the overtime available on August 20, 1999.

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*2/ Gollither did not testify herein.*

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Union Representative Clark stated herein that the Union brought the grievance in this case because it felt that because employees cannot turn down overtime pursuant to Article 20 without a valid reason, if the employees are not given proper recognition for their seniority, the County could then assign overtime to anyone it wished in order to punish or reward certain employees.

Clark also stated that he felt that the Bielarczyk Award (Case 278, No. 54596, MA-9734) was different from the instant case. Clark stated that he believed that Golliher should have received the August 20, 1999, overtime working on the Outagamie County "sheep's foot" roller because he was the senior roller operator and he had an expectation of working with the paving crew during the Summer paving season and of being assigned to overtime with that crew.

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Clark admitted that on August 20, 1999, Golliher's roller machine had been sent out for repair. Clark stated that the County could have trained Golliher on the "sheep's foot" roller and that at the County Highway Department, as employees gain seniority they are able to sign for jobs so as to be assured that they can consistently operate certain equipment. In this instance, as Golliher (the senior roller operator) had signed for that position, he should have been able to rely on receiving all roller overtime during the paving season.

On September 2, 1999, Grievant Golliher filed a grievance 3/ indicating that management had not asked him to work on Friday, August 20, 1999, instead of a less senior Class II laborer (Delap) who worked the overtime. The grievance cited Article 6 and requested that Golliher receive the overtime pay that he was entitled to. In its answer dated September 8, 1999, the Highway Commissioner John Haese stated that pursuant to Article 1, Management Rights, the County:

. . . has the right to assign employees to jobs, equipment and overtime work. In this particular case, a compactor (sheeps foot roller) had been borrowed from Outagamie County. One of our highway department employees, Paul Delap, had been familiarized with and operating for several days. Therefore, the decision was made to keep him on the compactor for the duration of the project.

Haese also cited the Bielarczyk Arbitration Award, issued March 2, 1998, as support for the County's position.

Finally, it should be noted that the Winnebago County Highway Commission employee handbook shows that the County has no work rules which address the assignment and distribution of overtime work.

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*3/ No issue of timeliness was placed before the Arbitrator herein.*

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## **POSITIONS OF THE PARTIES**

### **The County**

The County argued that the contract does not assure employees the right to the assignment of overtime based upon seniority. In fact, the County noted that the contract

provides just the opposite: that the employer has the right under Article 1, to assign overtime work. In addition, there is no language in the contract to the contrary.

The Highway Department's management right to assign overtime to employees has been contested by the Union in the past. In a case factually similar to the instant case, WERC Arbitrator Bielarczyk found that the labor contract contained no language that required the County to distribute overtime based on seniority and that no evidence of past practice had been

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submitted to show that the County had violated the contract, by not calling in a more senior employee when the County changed equipment on the project and chose to use a less senior employee on overtime on that project. Bielarczyk noted that so long as the operator of the equipment was qualified to use the equipment selected, the County had the right to offer the overtime to a less senior employee who was present on the project.

The County therefore urged that in accord with its past interpretation of the contract, past practice and the Bielarczyk Award, no contract violation occurred here where less senior employee Delap was assigned and retained to operate the same equipment on a project he had been working on all week, to finish that project on overtime. The County contended that the grievance should be denied and dismissed in its entirety for these reasons.

### **The Union**

The Union did not contest the employer's right to assign overtime, but it urged that this right should be tempered by Article 6 of the contract which requires the County to recognize seniority and indicates that the County will determine benefits based upon seniority. Therefore, in the Union's view, the County should have assigned the August 20, 1999, overtime work on County GG to senior roller operator Gollihier, as there was nothing in the contract, past practice or prior arbitration awards which would give the County the right to arbitrarily assign the overtime work as it did in this case.

The Union also noted that Article 20 of the labor agreement requires employees to perform overtime "except for valid reasons" whenever the County requests that they do so. Given this fact and the fact that Highway Department employees use their seniority to post for highly desired equipment operator positions, the Union urged that senior roller operator Gollihier, who had used his seniority to get his roller operator position, should have been able to reasonably rely upon receiving roller operator overtime. The Union noted that overtime and overtime pay are important benefits to unit employees and that the County's practice of not assigning employees overtime until the day before the overtime is performed has been problematic. 4/

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*4/ The Union submitted no evidence herein on this latter point.*

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The County's reliance on the Bielarczyk Award was misplaced, in the Union's view, as that case is factually distinguishable from the instant one. There, the overtime occurred after most employees had gone home from the project. The Union argued that in that case, the County should have called in a senior operator rather than using a less senior employee who happened to be at the project. In the instant case, the equipment was borrowed from Outagamie County. Junior operator Delap had been assigned to perform straight time work on the roller while the Grievant did roller operator duties on another project all week. Thus, it is understandable that the Union did not take issue with the straight time assignment of Delap to the "sheep's foot" roller during the regular work week.

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In addition, the Union noted that Superintendent Rasmussen admitted that the Grievant could have operated the "sheep's foot" roller and that if all things were equal, the County generally does assign overtime by seniority. Therefore, the Union urged that the County should have assigned Gollither, the senior operator, to perform the overtime work available on August 20, 1999.

The Union disputed the County's argument that a delay would have occurred had the County assigned senior roller operator Gollither to the "sheep's foot" roller on August 20<sup>th</sup>. The Union argued that Gollither, with his greater experience and craftsmanship as the senior roller operator, could have easily familiarized himself with the "sheep's foot" roller in the 15-20 minutes (or less) that Rasmussen stated it took Delap to receive his training on the machine. Thereafter, Gollither could have easily finished the project. As Gollither had posted for his roller job, he should have been given the overtime, which he had both the right and the obligation to perform as senior roller operator under the labor agreement. The Union queried if the County does not recognize seniority in the type of situation involved in this case and senior employees cannot rely on their seniority, when would seniority be a benefit to unit employees. Therefore, the Union sought that the grievance be sustained and that Gollither be made whole.

### DISCUSSION

The effective labor agreement between the parties is silent regarding how overtime is to be assigned to employees. Significantly, the instant contract does not assure unit employees the right to be assigned overtime based upon their seniority, as many labor contracts do. In this regard, I note that Article 1, Management Rights, specifically reserves to the County the right to "assign overtime." In addition, the parties stipulated that the County's work rules applicable to the bargaining unit do not address how overtime should be assigned. Finally, the contract does not guarantee that employees who have posted for and received specific equipment assignments must be employed on that equipment.

The Union has argued that because Article 20, Overtime, requires employees to work overtime in non-emergency situations when requested by the County (unless they have valid reasons) and because Article 6 of the labor agreement requires that the County recognize overtime and states that the County will determine benefits based upon seniority, the County should be required to assign work in the Highway Department on the basis of seniority. In this regard, the Union noted that Highway Department employees use their seniority to post for equipment operator positions and that to allow the County to disregard seniority by designating



any employee they choose to operate such equipment, instead of the senior operator, would effectively destroy the value of seniority in the Highway Department.

The difficulty the Arbitrator finds with these arguments is that the contract contains a broad Management Rights clause (Article 1) and there is no specific contractual provision which mandates that overtime be assigned by the County on the basis of employee seniority or on the basis of successful posting into equipment positions. Also, there is no evidence on this record to demonstrate what the *quid pro quo* for the language contained in Article 20 was or when that language was placed in the labor agreement and no work rules or practices were

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submitted to support the Union's assertions regarding Articles 6 and 20. In these circumstances, one cannot reasonably conclude that the parties intended that overtime be assigned on the basis of seniority only.

The County proffered and the Union argued against the submission and consideration of a 1998 Award between these parties, authored by WERC Arbitrator Edmond Bielarczyk, Jr. There, Bielarczyk found that the County did not violate the labor agreement because it was not required thereby to call in the grievant for overtime work to operate equipment he had posted onto on an ongoing project (on which the grievant had not been previously employed). Bielarczyk held that the County was privileged under those circumstances and the labor agreement to retain the employee on the project who had been working on that project to perform the overtime work necessary and that management's decision at the last minute to use the grievant's posted equipment on the project to perform the overtime work was made based on business necessity reasons (weather/ground conditions). In this Arbitrator's view, the facts of the Bielarczyk Award are distinguishable from those of the instant case.

In the instant case, the equipment was rented by the County from Outagamie County and Operator Delap had been assigned to operate the sheep's foot roller for the entire week prior to his assignment to perform overtime work on that equipment in order to finish that project. Under the specific facts of this case, the issue before Arbitrator Bielarczyk, whether the contract requires the County to assign overtime work to the senior operator on that specific posted equipment (owned by the County), is not before me.

The Union asserted that the County's decision to retain Operator Delap on the sheep's foot roller for overtime work at the end of the week on August 20, 1999, was an arbitrary assignment. However, the facts failed to support such a conclusion. In this case, I note that Superintendent Rasmussen stated that although it is County practice to assign overtime on the basis of seniority, where an employee has been working on a project, the County prefers continuity of work over seniority when it assigns employee overtime. 5/ I cannot find that Rasmussen's preference for continuity of work on August 20, 1999, was arbitrary or unreasonable based on the facts of this case. Nor did the Union materially contest this point. In fact, the Union admitted herein that the Employer has the right to assign overtime. The facts herein showed that Delap had been employed consistently on the County GG project for the entire workweek prior to his assignment to complete that project on overtime using the same equipment that he had been operating for the entire week (the rented sheep's foot roller). Thus, the fact that Delap had greater experience with this type of equipment and with the

County GG project and needed no training or familiarization thereon were valid reasons for the County's decision to retain Delap on the project in order to complete the project on August 20, 1999; given the language contained in the labor agreement.

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*5/ There is no evidence to show that assigning Gollither to perform the August 20, 1999, overtime would have significantly delayed the project. The County also conceded that Gollither is an experience and capable operator.*

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In all of the circumstances of this case, I cannot find a violation of the labor agreement or of past practice given the specific facts involved herein, and I therefore, issue the following

**AWARD**

The County did not violate the collective bargaining agreement when it failed to offer overtime to a senior roller man (Gollither) on August 20, 1999. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 22<sup>nd</sup> day of May, 2002.

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

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